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IN THE

Supreme Court of the United States

OCTOBER TERM

No. 474

NAUMKEAG THEATRES CO., INC.,
Petitioner,

versus

NEW ENGLAND THEATRES, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, NAUMKEAG THEATRES CO., INC., PETITIONER, PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW FINAL JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED IN THE ABOVE-ENTITLED CASE MAY 25, 1965.

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NEW ENGLAND THEATRES, INC., et al.,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner Naumkeag Theatres Co., Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for First Circuit, affirming the direction of a verdict for the respondents at the close of petitioner's evidence.

OPINION BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 345 Fed. 2d. 910.

(See Appendix A)

JURISDICTION

The Judgment of the United States Court of Appeals for the First Circuit was entered on May 25, 1965 (See Appendix A). The Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

The jurisdiction of the District Court was invoked because a question arises under the Sherman and Clayton Acts (15 U.S.C.)

QUESTIONS PRESENTED*

1. Whether a court may completely nullify decisions of this court; by taking from the jury consideration of circumstantial evidence of a nature which this court and other circuit courts have held amply warrants the submission of the issue of conspiracy to the jury.

2. Whether the petitioner, against whom a directed verdict was ordered by the trial court and affirmed by the First Circuit, was deprived of a trial by jury by the Court below, when the Court below made factual rulings on the sufficiency of the evidence, examined the evidence piecemeal, rather than viewing it as a whole, did not allow petitioner the benefit of all the evidence, did not allow

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*The "Statement of Questions Involved" in the Court below is set out in Appendix B.

the petitioner the benefit of all inferences and presumptions to be drawn from the evidence in favor of petitioner in direct conflict with this Court's opinions in *Beacon Theatres Inc., v. Westover*, 359 U.S. 500 (1959), *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, and *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473.

3. Whether the Court below, in direct conflict with the Second Circuit, committed error in totally disregarding circumstantial evidence of a nature which the Second Circuit has held as a matter law presents a prima facie case of conspiracy for consideration by the jury, (even where the jury had already found substantial competition existed), in *J. J. Theatres, Inc. v. Twentieth Century Fox Film Corp.*, 212 F. 2d. 840 (2nd Circuit, 1954).

4. Whether relevant and probative evidence of conspiracy may be excluded on the sole grounds that the operator of the theatre concerning which the evidence relates is not a defendant or alleged to be a co-conspirator.

5. Whether the Court below having previously affirmed directed verdicts of trial courts in antitrust cases in *Brown v. Western Massachusetts Theatres, Inc.*, 288 F. 2d. 652 (1961) and *Winchester Theatre v. Paramount*, 324 F. 2d. 652 (1963) has, in this case, formed a criterion as to the sufficiency of evidence needed to show a conspiracy by circumstantial evidence which is more stringent than, and inconsistent with, the decisions of this Court.

6. Whether the Court below, by its holdings on the issues inherent in Questions 1-5, has not so severely limited the private antitrust suit in the First Circuit as to cripple it as a device for the enforcement of the antitrust laws, thereby expanding the litigation task of the Department of Justice and, consequently, increasing the burden of this Court in this field.

The Proceedings

This action was brought under the anti-trust laws of the United States, 15 U.S.C. by the operator of a motion picture theatre in Salem, Massachusetts, against the major distributors of motion picture film and against operators of theatres in Lynn and in Boston.*

At the close of petitioner's evidence the respondents moved that the Trial Court direct a verdict in their favor. The Court ordered a verdict for them, on which he subsequently entered judgment (36, 1571-72).

Petitioner duly appealed to the United States Court of Appeals for the First Circuit which affirmed the judgment of the District Court by opinion and judgment of

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*Prior to the trial the defendant distributor Columbia Pictures Corporation, which had served the plaintiff on the same availability with Lynn since about 1957 (R. iv-v, 27-28), was dismissed from the action on motion of the plaintiff. The defendant distributors RKO Teleradio Pictures, Inc., and Republic Pictures Corporation, both of whom went out of business in about 1956, and the exhibitor American Theatres Corporation were also dismissed on plaintiff's motion prior to the commencement of trial (R. v, viii, 29-21).

May 25, 1965 (See Appendices A, B). The cause is now before this Court on timely petition for writ of certiorari.

Statutes Involved

The statutes involved are Sections 1 and 2 of the Sherman Act. 15 U.S.C. 1, 2; Section 4 of the Clayton Act, 15 U.S.C. 15. The constitutional provision involved is the Seventh Amendment of the Constitution of the United States. These are printed and attached as Appendix C.

Statement of the Case

In order to set out the facts necessary to demonstrate the more than ample evidence which precluded the result reached by the Court below and the areas which the Court below refused to consider in its opinion, it will be necessary to discuss the facts in some detail.

The Parties

The Petitioner Naumkeag Theatres Co., Inc. (hereinafter referred to as "Naumkeag") was the operator of the Paramount Theatre in Salem from 1941 through July, 1962, and thereafter (R. 1181).*

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*The petitioner Naumkeag leased the Paramount Theatre Building from plaintiff below Naumkeag Amusement Co., Inc., which leased that theatre building from its owner plaintiff below Salem Realty Co., Inc. On December 9, 1963, the Court allowed plaintiff Naumkeag's motion to amend complaint to add Salem Realty Co., Inc., and Naumkeag Amusement Co., Inc., as party plaintiffs (R. v. 28-29). In accordance with a stipulation entered into by counsel for all defendants near the close of petitioner's case (R. 1556-58), petitioner's motion to dismiss plaintiff's Naumkeag Amusement and Salem Realty as party plaintiffs was allowed by the Court on February 5, 1964 (R. viii).

The respondent New England Theatres, Inc. (hereinafter referred to as "New England") from 1950 through July, 1962, managed and operated the Paramount Theatre in Lynn and from 25 to 35 other theatres in the New England States (R. 67, 149, 582). Prior to January 1, 1950, New England was affiliated with the respondent distributor Paramount Film (R. 347), and after that date and until July, 1962, New England was a subsidiary of American Broadcasting-Theatres, Inc. (hereinafter referred to as AB-PT. AB-PT controlled during that period approximately 475 theatres throughout the United States (R. 1135). The respondents Stanley Warner Management Corporation and Massachusetts Amusement Company (hereinafter referred to as "Stanley Warner" and "Massachusetts Amusement" respectively) are affiliated companies. Massachusetts Amusement owns the Warner Theatre in Lynn, and its affiliate Stanley Warner buys and books for and manages that theatre and other theatres (R. 587-588). As of March 1, 1953, Stanley Warner acquired a chain of theatres known as the Warner Bros. Theatres, and including the Warner Theatre in Lynn and a large number of other theatres throughout the United States, all of which had been affiliated with the respondent distributor Warner Bros. (R. 583, 584, 601, 622).*

The other respondents, all of whom are distributors of

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*Loew's Boston Theatre Company and RKO Theatres, Inc., operators of first-run Boston motion picture theatres, were originally among the defendant exhibitors, but were dismissed upon motion of the petitioner before the hearing before the Court of Appeals.

motion picture films are: Loew's, Paramount Film, Fox, Warner Bros., Universal and United Artists.**

The Theatres In Lynn and Salem

The petitioner's Paramount Theatre in Salem was located in downtown Salem. Petitioner's theatre and the defendant New England's Paramount Theatre in Lynn were the two largest and best theatres for many miles north of Boston (R. 259, 407-408). The Loew's branch manager testified that petitioner's theatre was physically at least equal to any of the three first suburban run theatres in Lynn, and was larger than two of those theatres i.e. the Warner and Capitol theatres (R. 270-271). Photographs of the theatre were admitted in evidence (Ex. 70, 71, App. 56-64). The United Artists sales manager told petitioner's manager, Mr. Field, that the petitioner's type of theatre petitioner had should be playing on an earlier availability, and that it could be set right on Broadway or downtown Boston. The Salem Theatre in Salem was also located in downtown Salem and was operated by Mr. E. M. Loew (not alleged to be a co-conspirator), who operated a circuit of theatres chiefly located in the New England States, including the Capitol Theatre in Lynn. The respondent New England's Paramount Theatre and the respondent Stanley Warner's Theatre were both located in downtown Lynn not too far from each other, or from E. M. Loew's Capitol Theatre (R. 1170-71).

The seating capacity of the first-run Lynn and first-run Salem theatres were as follows (R. 257, 336, 339, 1161, 1160-61, 1182):

**The full corporate names of those respondent distributors are respectfully, as follows: Loew's, Inc. (now known as Metro-Goldwyn-Mayer, Inc.); Paramount Film Distributing Corporation; Twentieth Century-Fox Film Corporation; Universal Film Exchanges, Inc.; and United Artists Corporation.

THEATRE	OPERATOR	SEATING CAPACITY
Paramount, Lynn	New England	2525
Paramount, Salem	Naumkeag	2187
Warner, Lynn	Stanley-Warner and Mass. Amusement	1700-1800
Capitol, Lynn	E. M. Loew	1100
Salem, Salem	E. M. Loew	1000-1200

The Uniform Structure of Runs and Clearance

During the entire period from 1950 to July, 1962, with only a few exceptions hereinafter specifically noted, petitioner's Paramount Theatre in Salem was required by each of the respondent distributors to play after the so-called first suburban run theatres of the respondents New England and Stanley Warner and Mr. E. M. Loew's Capitol Theatre in Lynn. From about 1950 through July, 1962, all the defendant distributors except Universal granted first-run theatres in Boston a 21-day clearance over so-called first suburban-run theatres in Lynn and many other communities near Boston (R. 71-73, 159, 230, 235-36, 348-50, 579-80, 811-12, 874-76). Universal had the same 21-day clearance in effect from the early 1950s through April 1962.

The theatres of respondents and of E. M. Loew in the City of Lynn and theatres in other communities which played on this 21-day availability after Boston were actually a second run after first-run Boston, but were referred to as "first suburban run theatres" or "21-day theatres." With a few minor exceptions, each of the defendant distributors licensed their product to the same first suburban run theatres on the 21 availability after Boston during the entire period from 1955 through at

least July 1962 (R. 71-73, 235-36, 349-50, 579-80, 836-38, 875-76).*

Town	Theatre	Operator
Lynn	Paramount or	New England Theatres
Lynn	Warner or	Stanley-Warner
Lynn	Capitol	E. M. Loew
Cambridge	University or	Stanley Sumner or Lawrence Harvey
Cambridge	Central Square	New England Theatres
Allston	Capitol	New England Theatres
Newton	Paramount	New England Theatres
Chelsea	Olympia	New England Theatres
Dorchester	Strand	New England Theatres
Waltham	Embassy	American Theatres
Mattapan	Oriental	American Theatres
West Roxbury	Hancock Village	American Theatres
Brighton	Cleveland Circle	American Theatres
Roxbury	Rivoli	American Theatres
East Boston	Seville	American Theatres
Brookline	Coolidge Corner	B. & Q. Circuit
Quincy	Strand	B. & Q. Circuit
Norwood	Norwood	Smith Management Circuit
Revere	Revere	Interstate Theatre Circuit
Malden	Granada or Strand	Middlesex Amusement Co.
Winthrop	Winthrop	Snyder

Each of these theatres had the privilege of playing day and date with the other first suburban run theatres on the 21-day availability (R. 593, 838-39, 875-76). Of these approximately 18 first suburban run theatres, only the Granada and Strand theatres in Malden, the University

*In April, 1962, Universal instituted a New Boston Releasing Plan which reduced the first-run Boston clearance to 14 days or less, and moved plaintiff's theatre up to an equal availability day and date with Lynn (R. 982-83, 987). Paramount Film and United Artists made at modification of the 21-day clearance of first-run Boston over first suburban runs whereby that clearance would be reduced on pictures which played long engagements in Boston (R. 449-50, 811-12).

Theatre in Cambridge, and the Winthrop Theatre in Winthrop, were operated by independent exhibitors connected with only the operation of one or a few theatres (R. 875). Warner Bros. also served the Community Theatre in Dedham on first suburban run and that was operated by an independent (R. 580). The remaining first suburban run theatres (see list above) were all controlled by circuit operators of which six (including the Paramount Theatre in Lynn) were operated by respondent New England, six by the former defendant American Theatres, and the Warner Theatre in Lynn by Stanley Warner (R. 580).

All the respondent distributors held back the theatre playing first-run in Salem (petitioner's Paramount or E. M. Loew's Salem) to an availability of immediately after first-run Lynn during the entire damage period from 1955 through 1962. (R. 249, 388, 623, 702-3, 881, 1221-2, 1226, 1243, 1250), except that in April, 1962 Universal moved the first-run Salem theatres up to the same availability as Lynn, day and date on the first suburban run as part of its new Boston Releasing Plan. That availability of first-run Salem of immediately after first-run Lynn had been in effect since the late 1940's or early 1950's on the product of all the defendant distributors, except Loew's (R. 881, 1199, 1220, 1233, 1243). The Loew's availability for first-run Salem had been 7 days after first-run Lynn until 1955, when that availability was reduced to immediately after first-run Lynn (R. 249 50).

Split of Product in Salem and Lynn

In order to end competitive bidding in Salem which had been in effect on the product of all the defendant distributors from the early 1950's, petitioner and Mr. E. M. Loew, the operator of the Salem Theatre, made an agreement to split product in Salem (R. 1204, 1228-29). As a result of this agreement after mid-1956 petitioner's theatre played the pictures of Paramount Film and Fox and the Salem Theatre played the pictures of Loew's and Warner Bros., while the pictures of Universal, United Artists and Columbia were divided evenly between the theatres (R. 1229-30).

During the bulk of the period from 1955 to 1962 there was also a three-way split of product in effect between New England, Stanley Warner and Mr. E. M. Loew in Lynn (R. 245-46, 1141-42). Pursuant to the split: New England's Paramount Theatre played all the Paramount Film product, two-thirds of the Fox product, one-third of the Universal product (R. 878, 1140-41); Stanley Warner's Warner Theatre played all of the Warner Bros. product, one-third of the Loew's product, two-thirds of the Universal product and most of the United Artists product (R. 819, 878, 622, 819, 878, 1141); E. M. Loew's Capitol Theatre played one-third of the Fox product, one-third of the Loew's product, some of the United Artists product, and all of the non-defendant Columbia's product (R. 819, 1141).

Uniform Denial of Petitioner's Request For First Suburban Run

From 1950 to 1954 Mr. John Derry, an officer and stockholder of petitioner corporation, and its principal

stockholder, had conversations requesting an earlier availability and lower film costs with representatives of the respondents Paramount Film (R. 1563-64), Fox (R. 1565, 1568), Universal (R. 1257, 1564, 1568-69), and Warner (R. 1564).

After Mr. Derry's death, Mr. James Field took over sole charge of buying and booking for the Paramount Theatre in Salem (R. 1181). He had been manager of the theatre since about 1935 and had assisted in buying and booking for the Paramount Theatre in Salem since 1950 (R. 1180). In 1954 all the distributors except Loew's was serving petitioner on an availability of immediately after first run, while Loew's availability was 7 days after first run (R. 249-50). From 1954 to 1958 Mr. Field had conversations with representatives of Paramount, Fox, United Artists and Universal, requesting a day and date availability with Lynn for the Paramount Theatre in Salem and pointing out that Ipswich and Gloucester were playing ahead of Salem (R. 393-94, 846, 1201-5, 1212, 1213, 1218-20, 1226, 1243-47, 1250-54, 1256-62). He had similar conversations with representatives of the respondents Warner Bros. up to mid-1956 (R. 1233-34). Plaintiff played no Warner Bros. product in Salem after mid-1956 due to the split with E. M. Loew's Salem Theatre (R. 683, 1228-30. In 1954 Field had conversations with representatives of Loew's about an earlier availability for petitioner theatre (R. 1227). In the summer of 1955 Loew's changed petitioner's availability from 7 days after Lynn to immediately after Lynn (R. 249-50, 1227-28).

On February 20, 1956 Mr. Chapple, an attorney, wrote a letter on behalf of the petitioner to the defendants United Artists, Fox, Warner, Loew's, and Universal, stating that he was informed that the Middleton Drive-In

Theatre had requested a 21 day availability after Boston, and that if this request was granted plaintiff wanted the same privilege (R. 1231, 1235, 1248, 1255; Ex. 3, App. 1-2; Ex. 42, App. 29; Ex. 72, App. 65-66; Ex. 74, App. 70-71; Ex. 76, App. 74). At the time of that letter petitioner was still playing product of all the respondent distributors first run in Salem pursuant to competitive bidding against the Salem Theatre (R. 1203-4). After mid-1956, as a result of the split with E. M. Loew's Salem Theatre, the petitioner did not play any Loew's or Warner product (R. 683, 1228-30).

Petitioner's manager, Mr. Field, sent a letter on January 31, 1958 to all the respondent distributors requesting a 21 day availability for plaintiff's Paramount Theatre Salem, with bidding for that availability if necessary (R. Ex. 4, App. 5; Ex. 26, App. 16; Ex. 43, App. 30; Ex. 55, App. 32; Ex. 73, App. 67; Ex. 75, App. 72). Hereinafter this letter, for convenience, will be referred to as the 1958 "bid or negotiate" letter.

Paramount Film and Fox replied to Field's 1958 "bid or negotiate" letter by instituting competitive bidding between the Paramount Theatre in Salem and the first run theatres in Lynn for the 21 day availability after Boston (Ex. 4, App. 3-5; Ex. 26, App. 16-18; R. 1214, 1221-22). Mr. Field testified that petitioner bid on the product of Paramount Film for a period up to 1962, except for a period of about a year and one-half, he didn't bid on any Paramount Film Pictures. He said that petitioner was "bidding and hadn't won any pictures and we just noted the futility of bidding any further and stopped." Plaintiff never won any Paramount Film pictures on bidding against Lynn (R. 1217) and petitioner was never licensed any Paramount Film pictures earlier

than after Lynn (R. 393). With the exception of six unimportant Fox pictures won on the competitive bidding against Lynn (R. 1224-26), petitioner played Fox product from the early 1950's through July, 1962 on an availability of immediately after Lynn (R. 1220, 1226). While petitioner's theatre was bidding against first run Lynn from 1958 to 1962 Mr. Field continued to inform Fox and Paramount representatives that Columbia was allowing plaintiff to play day and date with Lynn without bidding (R. 107-108, 1218), and asked Fox to do the same thing (R. 140).

United Artists answered Field's 1958 "bid or negotiate" letter in writing on March 7, 1958, stating ". . . We are rejecting your request to change the availability for the Paramount Theatre, Salem." (Ex. 75, App. 72-73). The United Artists branch manager did not recall any requests for bidding, but admitted that if bidding had been allowed United Artists would only have had to accept the bid of the petitioner, if it were superior to their customer in Lynn, in that case he would have felt fair in recommending petitioner bid (R. 850). After 1958 Field informed United Artists representatives that petitioner was playing Columbia product day and date with Lynn, and told them how well it was doing (R. 1250-51), but there was no change in the availability of immediately after Lynn going up to July, 1962 (R. 857, 1250).

Loew's replied to Mr. Field's 1958 "bid or negotiate" letter: "As we have heretofore advised, it is our considered opinion that first-run Lynn is entitled to at least the existing clearance over Salem. We believe that Salem is playing in its proper position and should not be disturbed at this time." (Ex. 73, App. 69). It appeared, however, that competitive bidding was usually granted by

Loew's 99% of the time it was requested (R. 316). After 1958, Field had conversations with the Loew's branch manager informing him that petitioner was outgrossing the Capitol Theatre in Lynn on pictures played day and date of Columbia (R. 295, 1232-33). Loew's never at any time offered petitioner any earlier availability than after Lynn (R. 276).

At the time Mr. Field's "Bid or negotiate" letter of January 31, 1958 was received by the respondent Warner Bros., petitioner was not playing Warner Bros. product in Salem (R. 1235-36; Ex. 42, App. 29). Kumins, the Warner branch manager, admitted receiving the "bid or negotiate" letter, but stated that Field had told him that sending the letter to Warner Bros. was a "mistake" (R. 760). Mr. Field testified that Kumins had told him shortly after the sending of the letter, that since petitioner was not playing Warner Bros. product in Salem, Kumins didn't see why plaintiff should be allowed to play Warner Bros. Pictures on a 21 day availability (R. 1236-37). Field testified that he had not said it was a "mistake" to send the letter to Warner Bros. (R. 1240), and that he had told Kumins that he would play Warner Bros. product if given the availability of day and date with Lynn (R. 1239), or if given the right to bid against Lynn (R. 1440, 1526).

Kumins admitted that in 1956 and 1958 he understood petitioner to be requesting the same availability as Lynn, 21 days after Boston (R. 712). He said that he had not interpreted the 1958 "bid or negotiate" letter (Ex. 43) as a request to bid, and admitted that he now saw the letter could be interpreted as a request to bid (R. 650). He admitted that if a request for bidding had been made by the petitioner, there was no possible reason to deny

the request (R. 650-51, 715, 187). The evidence showed that competitive bidding had the effect of substantially raising the revenue paid by the exhibitor to the distributor (R. 666, 694, 718, 723-24). At no time was petitioner's Paramount Theatre in Salem licensed a Warner Bros. picture on the 21 day availability, or day or date with Lynn (R. 652, 715).

In reply to Mr. Field's "bid or negotiate" letter of 1958, the Universal branch manager, Mr. Feltman, wrote to Mr. Field on February 14, 1958 asking for a clarification of the letter (Ex. 55, App. 32-33). Feltman didn't remember any further discussion with Field with reference to the letter, although he would not say there was not any further discussion (R. 969). He did refer to the letter as a request to bid in his testimony (R. 968). Mr. Field testified that after receiving Feltman's letter of February 14, 1958, he told Feltman, "Well, the letter is self-explanatory. We requested 21 day availability and if necessary we will bid for it." Mr. Feltman said that Salem playing day and date with Lynn was better for the exhibitors than bidding (R. 976-77). However, he wouldn't recommend Salem bidding against Lynn (R. 970, 973-74), although it was his position from 1955 through 1962 that Lynn should have clearance over Salem (R. 974).

About April 4, 1962 Universal put into effect its New Boston Releasing Plan (R. 987) which reduced the clearance of first-run Boston over first suburban run theatres to 14 days or less (R. 987), and moved up the availability of the first-run theatres in Salem to day and date with first-run Lynn (R. 985). Pursuant to this new plan petitioner exhibited prior to July, 1962 two Universal pictures *Lover Come Back* and *Cape Fear* day and date at petitioner's theatre and at the Stanley-Warner Theatre

in Lynn. The two pictures played a total of 23 days at petitioner's theatre and 21 days at the Warner Theatre in Lynn with the following results (Ex. 57, 58):

Theatre	Days	Admission Receipts	Film Rental	Average Daily Gross	Average Daily Rental
Warner, Lynn	21	$12,779	$4,441	$608	$211
Paramount, Salem	23	$13,554	$5,267	$589	$230

Mr. Field testified that the sales manager of Universal had stated to him after the day and date exhibition on *Lover Come Back* that "I guess you proved a point" (R. 1266-67). These were the only two Universal pictures which played petitioner's theatre day and date with Lynn, or on first suburban run, during the entire period from 1950 through July, 1962 (R. 1011).

Unfair Conduct of Competitive Bidding By Paramount Film and Fox

Petitioner's manager, Mr. Field, testified that he had not won any Paramount Film pictures on bidding and that plaintiff had continued to bid on their pictures for a period right up to 1962; but that there was also a period of a year when petitioner didn't bid on any of their pictures, because "We were bidding and hadn't won any pictures and we just noticed the futility of bidding any further and stopped." Mr. Field testified that the six Fox pictures won on competitive bidding were "nervous pictures", and of little value at the box-office. Mr. Fields was not permitted by Trial Court to testify as to pictures on which the percentage terms bid by the plaintiff would have actually produced a larger film rental than the respondent distributor had received from the respondent distributor in Lynn (R. 13, 14, 15). However, the Court of Appeals conceded that petitioner had offered evidence of a number of pictures of Fox and Paramount

Film on which the percentage terms bid by plaintiff would have produced a larger rental to the defendant distributor on first suburban run, if petitioner had been awarded the picture and grossed as much as the first-run Lynn exhibitor, and that "there was also evidence from which jury could conclude that plaintiff's theatre was capable of grossing as much as the defendant theatres," and Appendix.

Field testified that during the competitive bidding against Lynn he received notifications on many Fox pictures, some of which he had bid on and some of which he had not, that the bids were being rejected and that Fox would "attempt to negotiate satisfactory terms" (R. 141-14; Ex. 82). However, Mr. Field testified that no one from Fox ever re-negotiated with him on any picture on which he had received such a notification (1414), although Exhibit 82 and 119 contained more than 40 of such notifications sent out by Fox to petitioner (See Appendix). Likewise, in the Paramount Film file concerning bidding between petitioner's theatre and first-run Lynn there are dozens of transmittal forms containing the statement "result of oral negotiations" or "negotiated offer" (Ex. 30, for example see Ex. 30 F. App. 28). Nevertheless, on only a couple of occasions did Paramount Film ever approach Mr. Field to negotiate terms for a picture on the 21 day availability, when the bids on that picture have been rejected (R. 1414).

Gross Admission Receipts and Film Rentals In Lynn and Salem

Generally the respondent distributors who testified at the trial testified to holding the petitioner's theatre after Lynn on the grounds that they felt there was substantial

competition between the Lynn and Salem Theatres, and that the first-run Lynn Theatres consistently had higher gross admission receipts (R. 270-71, 631, 887). However, the comparison of admission receipts made by the respondent distributors was based on the theatres of the respondent exhibitors in Lynn playing pictures earlier than petitioner's theatre (R. 270-71, 416-17, 632). Generally these distributors admitted that if petitioner's theatre had played on the first suburban run as requested, its gross receipts would have increased (R. 270-71, 632, 891, 1025). Despite these contentions of the respondent distributors, the Court of Appeals conceded that "there was also evidence from which a jury could conclude that plaintiff's theatre was capable of grossing as much as the defendant theatres." (See Appendix A, page 7a).

Respondent Distributors' Knowledge

The evidence showed that the respondent distributors kept well informed of what was going on in the motion picture business, and what other distributors were doing. Respondent distributors testified of knowledge that other companies were serving the first suburban run theatres on the same 21 day availability (R. 191, 216, 238, 386, 590-91), and that other distributors were holding Salem theatres after Lynn theatres (R. 192, 250, 682). Various of the respondent distributors knew of the affiliation of respondents New England and Stanley Warner with circuits operating a large number of theatres throughout the United States, and that prior to that affiliation with those circuits the Warner Theatre and the Paramount Theatre in Lynn had been affiliated with respondent distributors Warner Bros. and Paramount Film (R. 69, 190, 346-47, 383, 583-584, 622-23, 867).

REASONS FOR ALLOWANCE OF THE WRIT

I. In General

Analysis of the opinion of the Court of Appeals for the First Circuit in this case leads to the inevitable conclusion that that Court has viewed the facts as a fact finder and has decided all permissible inferences and all issues of credibility against petitioner. Although it proports to recognize that a conspiracy may be proved by circumstantial evidence, the Court seems to have ruled in effect to the contrary. It seems to hold that no circumstantial evidence is strong enough to warrant an inference of conspiracy.

Of course, neither in the Trial Court nor in the Court of Appeals did plaintiff claim that it had direct evidence of conspiracy. However, the facts demonstrate ample circumstantial evidence of a nature which decisions of this court and other circuit courts indicate amply supports an inference of conspiracy. In an effort to facilitate analysis of the circumstantial evidence offered at the trial, petitioner has attempted, as it did in the Court below, to segregate this circumstantial evidence into various artificial categories. It should be noted that much of the evidence stressed by petitioner with regard to one category, may also have almost equal relevance in other categories. However, this artificial classification is for convenience only, and it is clear from this Court's earlier pronouncements on the subject that all petitioner's evidence of conspiracy should be weighed as a whole, and the evidence should not be compartmentalized or examined piecemeal. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S., 690 (1962).

Among the circumstantial evidence offered by the peti-

tioner was evidence tending to prove conscious parallel action of the respondent distributors. Perhaps the chief evidence bearing on this issue is outlined in petitioner's "statement of facts" (See: *Uniform Structure of Runs and Clearance, Uniform Denial of Petitioner's Request for First Suburban Run, Respondent Distributors' Knowledge*). However, no useful purpose is served by discussing this evidence since the majority of the Court of Appeals conceded the existence of "conscious parallelism" here (see Appendix A, 2a-3a). Other circumstantial evidence was for convenience referred to by petitioner in the Court below as "plus" factors, but simply for convenience in categorizing the evidence with relation to the standards set up by the First Circuit in *Winchester v. Paramount* 324 F. 2d. 652. There the Court had held in effect that something additional or something "plus" conscious parallelism was necessary for a prima facie case of conspiracy.

Petitioner stressed in the Court below, as well as in the Trial Court, that its circumstantial evidence of conspiracy was equally probative of vertical conspiracy between each of the respondent distributors and the respondent exhibitors, as well as probative of horizontal conspiracy. The Court below completely ignored this fact in its certain opinion (See Section IV). Petitioner's circumstantial evidence of conspiracy or so-called "plus factors", equally probative of both horizontal or vertical conspiracy, may be categorized for convenience as follows: (1) evidence that respondent distributors required petitioner's theatre to follow theatres of Lynn respondent exhibitors with which it was not in *substantial* competition (Section II); (2) evidence that conduct of respondent distributors in holding petitioner's theatre after Lynn was contrary to their best business interests, (Section II); (3)

evidence that respondent distributors either refused to permit petitioner to bid against Lynn respondent exhibitors, or permitted that bidding, but conducted it unfairly (Section II), (4) evidence that in holding petitioner's theatre after Lynn, respondent distributors treated petitioner's theatre by a less favorable standard than theatres of Lynn respondent exhibitors and other chain theatres playing on first suburban run (Section III); (5) evidence that the uniform structure of runs and clearance, holding Salem after Lynn, was rigid and arbitrary, having been in effect for at least a dozen years, and favoring theatres of large chain operators, formerly affiliated with two of respondent distributors (Section II); (6) evidence that the respondent distributors United Artists, Universal, Paramount Film and Fox discriminated against petitioner, and in favor of the Lynn respondent exhibitors, in the film rentals charged (Section II).

Evidence of the nature categorized in each of sections (1) through (6), above has been held by courts to warrant an inference of conspiracy, even when standing alone. However, it should be again stressed that petitioner was entitled to have this evidence, which has been categorized above only for convenience, examined in its entirety as evidence of conspiracy, without having it compartmentalized or examined piece meal.

Petitioner offered amply evidence of damage to it resulting from deprivation of product of each of respondent distributors on the first suburban run availability. Numerous authorities support petitioner's proof of damages. Since the Court below did not discuss petitioner's damage proof in general, petitioner has only briefly outlined here the nature of the evidence (Section V). The Trial Court also excluded opinion evidence of damage offered by pe-

titioner and evidence with regard to the Capitol Theatre in Lynn which was relevant on the issues of both damage and liability (Section VI). The exclusion of this evidence is not discussed in the opinion of the Court below.

II. The Decision of the Court Below is in Direct Conflict with the Decisions of this Court and Other Circuit Courts.

(a) The opinion of the Court below conflicts with a just and reasonable interpretation of the record as required by this Court in *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, (1931) and *Continental Ore Co. v. Union Carbide & Carbon Corp.* 370 U.S. 690 (1962).

With due reference to the Court below, petitioner respectfully submits that its opinion conflicts with the facts as revealed by the record.

(1) CONTRARY TO THE STATEMENTS OF THE COURT BELOW, THERE WAS AMPLE EVIDENCE THAT PETITIONER'S THEATRE WAS NOT IN SUBSTANTIAL COMPETITION WITH THE THEATRES OF LYNN RESPONDENT EXHIBITORS WHICH IT WAS REQUIRED TO FOLLOW.

Contrary to the holding of the Court below, there was ample evidence that would support a finding by the jury that petitioner's theatre was not in substantial competition with the theatres of respondent exhibitors in Lynn. The Court below concedes that holding petitioner after the Lynn theatres in the "absence of competition may be ground for suspicion" (Appendix A, 3a-4a). Presumably

it means the absence of *substantial* competition. However, the Court below then, in effect, considered the evidence as a fact finder and holds that it does not make out "enough on this issue to warrant a verdict in petitioner's favor to stand." It arrives that this result based solely on some purported contradictions in the testimony of petitioner's general manager on this issue advanced by counsel for respondents and without considering other evidence in the records which tends to support the conclusion that there was no substantial competition between the theatres in Salem and Lynn. Furthermore, the Court below concedes that normally any contradictions in Mr. Field's testimony would be a matter for the jury to determine, but holds that this case constitutes an exception.

Mr. Field, petitioner's general manager, was extremely well qualified to testify as to the extent of competition between theatres in Salem and Lynn. He had spent almost 30 years as manager of the petitioner's theatre in Salem, and had lived in either Salem or the adjoining town of Marblehead all of his life (R. 1301). Mr. Field's testimony, unlike the opinions of the respondent distributors,* was based upon actual knowledge. He testified that he

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*A. Representatives of respondent distributors called by petitioner to testify at the trial generally attempted to justify the clearance of Lynn over Salem on grounds that the theatres in Salem were in substantial competition with the theatres in Lynn (R. 251-52, 408, 633, 887), and that the Lynn first-run theatres produced larger grosses and film rentals than the first-run theatres in Salem. The reasons given by the defendant distributors as to why there was substantial competition between Lynn and Salem were: the city of Lynn was larger than the city of Salem (R. 104, 117, 254, 631, 887); the theatres were 5 or 6 miles apart (R. 296, 631, 887, 977); the towns were accessible to each other (R. 631); a person could not tell when they left one town and went into another (R. 408); the area around Lynn and Salem was thickly settled (R. 138, 182, 408, 634, 853-54); and that Lynn was a shopping center (R. 255). None of them had any specific facts or figures to support their conclusion that there was substantial competition nor did they have specific knowledge as to the sources of patronage of the theatres involved. No survey of the drawing area of any theatres in Lynn or Salem had been made by any distributor (R. 256-57, 352, 409-10; 635; 852; 887-88).

knew where his patrons came from (R. 1300, 1302), although he did not know the exact percentage of patrons from each town (R. 1301). He stated that based on what he knew and had observed the largest proportion of his patrons came from Salem, and that the towns that he drew next most largely from were Beverly, Danvers, Peabody and Marblehead (R. 1303). He did draw some patrons from parts of Swampscott, some from Lynn, Ipswich, Hamilton, Wenham, Middleton and Topsfield (R. 1300, 1303). The number of patrons that he drew from Lynn would be slight (R. 1525).

Mr. Field testified that there was no substantial competition between the theatres in Lynn and the theatres in Salem, except with the rare exception of a picture like *Ten Commandments*, *Ben Hur* or *South Pacific*, which would draw from all over the Northshore area on an extended run for two or three weeks (R. 1303-4). It is also significant that petitioner's conduct had always been consistent with the absence of substantial competition between Salem and Lynn.*

Despite this testimony of Mr. Fields, based on experience and actual knowledge, the Court below takes the position that certain excerpts of Mr. Field's testimony advanced by respondents are so contradictory that his entire testimony on this issue is valueless (Appendix A, 5a). And although

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*B. The petitioner's requests had always been for a day and date availability with Lynn, if possible, although starting in 1958 (Ex. 4, App. 5), petitioner expressed the willingness to bid for the availability if necessary. Petitioner had been offered to let first-run Lynn play at the same time with petitioner on any pictures which petitioner was successful in winning on competitive bidding against Lynn (R. 1305-06). On a number of the bids against Lynn for first suburban on Fox and Paramount Film product petitioner had inserted the clause "with no clearance over Lynn" (Ex. 30 D, App. 22; Ex. 78, App. 88; Ex. 119, App. 196). Certainly plaintiff would not have been willing to play day and date with Lynn on pictures it won on competitive bidding, if petitioner felt there was substantial competition with Lynn.

the excerpts upon this holding is based are almost entirely from Field's cross-examination by respondents' counsel, without Field being allowed to explain his answers, the Court below apparently does not consider clarifications of those answers which he has made on subsequent examination by his own counsel. For example, although Field testified that the difference in petitioner's availability of about seven days after first suburban run made a difference to Field "only because Lynn was playing pictures ahead" of the petitioner and that its "big loss" was Lynn, Field also testified that Lynn was petitioner's "big loss" because it was responsible for petitioner "not being able to pay early" (R. 1422). The Court below states that "Salem residents, as well as those of Peabody and Marblehead an 'important part', of his (Field's) patronage, were, 'other things being equal,' by which he quite apparently meant 'day and date' showing, as likely to go to the movies in Lynn as in Salem." However, a reasonable interpretation of the testimony is that "other things being equal," simply means aside from Field's actual knowledge of the patronage habits of the people in those areas. Nor does the Court below consider the fact that a move-up in playing position can result in increased box-office receipts at a theatre because the earlier play of a picture in the area when new (through advertising, etc.) tends to stimulate new patrons who would not otherwise go out to any theatre. Therefore patronage is created without taking substantial business away from another theatre. (R.).

The Court below further ignores the existence of factual evidence in the record which the jury could consider in determining the presence or absence of substantial compe-

tition and against which evidence the jury could weigh any contradictory statements in Field's testimony.*

The testimony of Mr. Owens, connected with the operation of Mr. E. M. Loew's Capitol Theatre in Lynn and Salem Theatre in Salem, also tended to collaborate Mr. Field. The Trial Court refused to allow Mr. Owens to testify as to his knowledge of the sources of patronage of the Capitol Theatre in Lynn, or his opinion as to the sources of patronage of the Warner and Paramount Theatres in Lynn (R. 1541-42), but his testimony as to the drawing area of the Salem Theatre in Salem tended to collaborate Mr. Field's testimony (R. 1543).

The record clearly presented an issue of fact for the jury. The Court below was in error in holding to the contrary. In arriving at the result which it reached, the Court below overlooked and failed to consider pertinent facts. It completely and incorrectly swallowed respondents' theory regarding selected and isolated excerpts from Field's testimony, overlooking evidence which collaborated Field's direct testimony, and gave petitioner none of the inferences to which it was entitled. The ruling of the Court below is clearly contrary to long established precedents in this Court most recently restated in *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962).

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*There was ample evidence with regard to the theatres in Lynn and Salem, including their size, location, the distance between Lynn and Salem, the populations in surrounding and intervening areas and Mr. Field's testimony as to his actual knowledge of the areas from which petitioner's theatre drew patronage.

(2) CONTRARY TO THE OPINION OF THE COURT BELOW, THERE WAS AMPLE EVIDENCE THAT PLACING PETITIONER'S THEATRE BEHIND LYNN WAS AGAINST RESPONDENTS DISTRIBUTORS' BEST FINANCIAL INTERESTS.

The Court below held that petitioner's contention that placing it behind Lynn was contrary to respondents exhibitors' (sic. distributors') best financial interests, independently considered was totally unsubstantiated." (Appendix A, 6a). However, the evidence was to the contrary. The record contained ample evidence that the conduct of the respondent distributors in placing petitioner behind Lynn was against their best financial interests. Apparently the Court below was not convinced by this evidence, however, petitioner was entitled to have this fact question determined by the jury. Clearly such evidence of conduct against best business interests supports an inference of conspiracy. *Dipson Theatres v. Buffalo Theatres, Inc.*, 190 F. 2d. 951, 968 (2d. Cir. 1951), cert. den. 342 U.S. 926 (1952).

The result reached by the Court below is particularly remarkable since its opinion concedes that petitioner's "theatre was on a par, so far as size and excellence of appointments are concerned, with defendant theatres" (Appendix A, 2a), and that "there was also evidence from which a jury could conclude that plaintiff's theatre was capable of grossing as much as the defendant theatres" (Appendix A, 7a). The Court below ignored that evidence of this nature alone has been held by the Second Circuit, citing this Court, to make out a prima facie case of conspiracy, stating:

> ". . . . . So evidence tending to show that an independent exhibitor, operating a theatre at least as desirable as the theatres of the exhibitors affiliated with the major concerns, was refused first-run films for exhibition was held to make out a prima facie case under the antitrust laws in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 66 S. Ct. 594, 90. L. Ed. 652. Cf. *William Goldman Theatres v. Loew's Inc.*, 3 Cir. 150 F. 2d. 738." *Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc.* (2d. Cir.) 176 F. 2d. 594, 597.

However, in this action petitioner's evidence went much further. The record demonstrated that petitioner was able on a good picture to pay a much larger film rental than respondent exhibitors on the same gross, and as much or more film rental on a slightly lesser gross. For example, on the Paramount Film picture Breakfast at Tiffany's, petitioner's gross $4432 was $700 less than the gross at the Paramount Theatre in Lynn playing ahead of it, and yet petitioner paid $209 more in film rental. (App. 83).

The Fox branch manager admitted that the best evidence of the grossing ability of petitioner's theatre as compared to the first-run Lynn theatres would be a day and date exhibition (R. 223), and on the only two pictures played day and date with a theatre of respondent exhibitors in Lynn, the petitioner paid the respondent distributor Universal $5267 for a 23-day exhibition, which was $826 more rental than was paid by the Warner Theatre in Lynn for its 21-day exhibition on the same pictures. Petitioner paid an average daily film rental on those pictures of $230, as compared to $211 paid by the Warner Theatre. Although petitioner's theatre never played any picture day and date with New England's Paramount

Theatre in Lynn, it could be expected that the comparative results would be about the same since a number of distributors testified that the grossing ability of the Paramount Theatre in Lynn and the Warner Theatre were about the same on pictures of comparable box-office value (R. 247-48, 851).

It could also be found that petitioner's receipts would have been even greater than those of the respondent exhibitors in Lynn, if respondents had allowed petitioner to play their pictures regularly on the first suburban run (R. 666, 67). A "sporadic" policy would be harmful to the theatre owner, because if patrons did not know what the policy was generally, their own pattern of patronizing the theatre would be disturbed. *Fanchon & Marco v. Paramount Pictures, Inc.* (S.D. Cal.) 100 F. Supp. 84.

The opinion below also overlooks the fact that a move-up to an earlier playing position can result in substantially increased box-office receipts at a theatre because the earlier play of the picture in the area when new (due to national and local advertising, etc.) tends to stimulate new customers who would not otherwise go out to any theatre; therefore, patronage is created without taking substantial business away from another theatre (R. 831-32, 1317-18). The Trial Court in *J. J. Theatres v. Twentieth Century Fox Film Corp., supra,* commented on this fact that the earlier play of a picture will actually stimulate or create additional patronage in the area. This, of course, is why respondent distributors allowed approximately 18 theatres (15 of which were operated by circuits) from two and one-half to six miles apart to play on the first suburban run day and date, rather than playing them on successive runs. Therefore, allowing petitioner's theatre

to play day and date on the first suburban run would not have jeopardized respondents' revenue as asserted by the Court below, but on the contrary would have "maximized" the revenue from Salem and Lynn. This is demonstrated by the testimony of the Warner Bros. branch manager, who admitted that it was to his company's best business interest to play all the first suburban run theatres day and date, rather than on successive runs when he conceded that his company "maximized" its revenue, or made the most money, in that way (R. 595, 597). The record amply demonstrated that petitioner's theatre with regard to location, appointments and box-office grossing potential was amply suitable to play on first suburban run, and was in fact superior to some of the theatres playing on first suburban run.* The evidence of conduct against best business, even standing alone, warranted submission of the issue of conspiracy to the jury.

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*Respondent distributors generally admitted petitioner's theatre was physically comparable or superior to any of the first run theatres in Lynn (R. 259, 270-271, 407-408, 857, 1247). It was "certainly at least" as well appointed as the theatres of the respondent New England and former defendant American which played on the first suburban run in Dorchester and Mattapan (R. 637). Like the other theatres playing on first suburban run, petitioner's theatre was located in a typical thickly settled suburban area. There was also evidence that petitioner's theatre was a better grossing theatre than many of the theatres which had been allowed to play on first subsequent run by the respondent distributors. Universal's new Boston releasing plan reduced the number of first suburban run theatres by about 50% down to eight or nine theatres. It appeared that petitioner's theatre was moved up to the first suburban run under Universal's new plan and that Universal had tried to select the best grossing theatres for the first suburban run (985, 988).

(3) THE COURT BELOW IMPROPERLY DENIED PETITION ON THE BENEFIT OF PERMISSIBLE INFERENCES REGARDING DENIAL OF COMPETITIVE BIDDING BY CERTAIN RESPONDENT DISTRIBUTORS, AND IMPROPERLY COMPARTMENTALIZED THE EVIDENCE WITH REGARD TO DENIAL OF COMPETITIVE BIDDING, AND UNFAIR CONDUCT OF COMPETITIVE BIDDING, RATHER THAN VIEWING THE RECORD AS A WHOLE.

The Court below conceded that "on its face, a refusal to permit competitive bidding, or the unfair conduct of permitted bidding, as another road "home", *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 3 Cir., 1961, 297 F. 2d. 199, 204, cert. den. 369 U.S. 839, would appear to constitute action against individual business interests from which a jury may infer conspiracy," (App. A, 8a).* However, the Court deprived petitioner of the benefit of its evidence with regard to unfair competitive bidding by Paramount Film and Fox, and refusal to permit competitive bidding by the other four respondent distributors, by deciding permissible inferences against plaintiff and considering evidence "piecemeal", rather than viewing all the evidence in the case as a whole. Outline of the evidence with regard to refusal to permit competitive bidding by United Artists, Warner Bros., Universal and Loew's appears in the statement of facts: *Uniform Denial of Petitioner's Request for First Suburban Run.* (supra).

(a) *The Court below denied petitioner the benefit of inferences to which it was entitled with re-*

Milgram v. Loew's, Inc., 3 Cir., 1951, 192 F. 2d. 579, 583, cert. denied. 343 U.S. 929; see *Bigelow v. RKO Radio Pictures, Inc.*, 1946, 327 U.S. 251, 256, 262; *J. J. Theatres, Inc., v. Twentieth Century-Fox Film Corp.*, 2 Cir. 1954, 212 F. 2d. 840.

gard to the denial of competitive bidding by Universal, Warner Bros., United Artists and Loew's.

It is undisputed that the respondent distributors, Universal, Warner Bros., United Artists and Loew's did not institute competitive bidding after receipt of petitioner's "bid or negotiate" letter, the text of which is set out in the opinion of the Court below (Appendix A, 9a-10a), however the majority of the Court below concluded that the effect of this refusal to allow bidding can be disregarded, because of the claimed ambiguity of petitioner's "bid or negotiate" letter. The majority view below completely overlooks the fact that petitioner verbally clarified this letter to Warner Bros., as well as Universal, as a request for the 21-day availability, with bidding against Lynn if necessary (R. 1239, 1440, 1526). In addition, contrary to the holding of the Court below, there is no evidence in the record that any United Artists representative misconstrued the "bid or negotiate" letter, or considered it ambiguous. On the contrary the United Artists branch manager had no recollection of a request for bidding by the petitioner (R. 850). It should also be noted that both United Artists (Ex. 75 App. 72-73) and Loew's (Ex. 73, App. 69) replied in writing by categorically refusing to change the existing clearance over Salem considering the claimed ambiguity of this letter, it should also be noted that the respondent Paramount Film and Fox both replied to the letter by instituting competitive bidding (without requiring any clarification of the letter) (Ex. 4, App. 3-5, Ex. 26, App. 16-18; R. 1214, 1221-22). Certainly as Judge Aldrich suggests below, any ambiguity as to whether or not bidding was requested in this letter was a matter for determination by the jury as finder of fact (Appendix A, 10a).

(b) *The Court below improperly compartmentalized petitioner's evidence with regard to the unfair conduct of competitive bidding by respondent's Fox and Paramount Film, and the refusal of the remaining respondent distributors to permit competitive bidding.*

Although the Court below concedes that there is evidence that the two respondents Paramount Film and Fox, who did permit petitioner to bid against Lynn, conducted that bidding unfairly, the Court deprived petitioner of the benefit of this evidence by examining it "piecemeal", standing alone, as evidence of a separate and distinct conspiracy. Contrary to the assertions of the Court below (Appendix A, 8a), there is no inconsistency that respondent distributors who would conspire to refuse petitioner the right to play day and date with Lynn respondent exhibitors, would also refuse petitioner the right to bid against those exhibitors, or after instituting competitive bidding, would conduct that bidding unfairly.

In considering petitioner's evidence "piecemeal" with regard to the denial of competitive bidding, and the unfair conduct of competitive bidding, and in depriving petitioner of permissible inferences from the facts in that regard, the Court below was squarely in conflict with decisions of this Court, most recently stated in *Continental Ore v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962).

(4) THE OPINION OF THE COURT BELOW OVERLOOKS EVIDENCE THAT RESPONDENT DISTRIBUTORS PARAMOUNT FILM, WARNER BROS., UNIVERSAL AND UNITED ARTISTS DISCRIMINATED AGAINST PETITIONER IN FAVOR OF THE RESPONDENT EXHIBITORS IN LYNN IN THE FILM RENTALS CHARGED ON IDENTICAL PICTURES.

The Court below completely overlooked evidence showing that the respondent distributors discriminated against petitioner in favor of the respondent exhibitors in Lynn and the film rentals charged. The cut-off cards of the respondent distributors indicate the majority of pictures licensed on percentage to petitioner and to the respondent exhibitors in Lynn were paid for on the basis of a so-called sliding scale (R. 1322-24; Ex. 13, 27, 28, 47, 48, 56, 58, 96A). The Paramount Film regional manager testified that according to the sliding scale in effect at the petitioner's theatre, petitioner would pay 50% of $5200 gross for a week, or about $2500, while on the same $5200 gross for a week, New England's Paramount in Lynn according to its scale would only pay 25% or about $1250 (R. 535, 536). The effect of the 25%-50% sliding scale at the two theatres on the Paramount picture *Geisha Boy* was that plaintiff grossing about $1000 less than New England's Paramount in Lynn, playing after that theatre, paid $480 more in film rental. (App. 83; R. 418-21).

The Universal branch manager testified that the Stanley Warner Theatre in Lynn on its scale with Universal would have to gross $12,640 to pay a 50% film rental and that Warner Theatre in Lynn would pay 35% as a gross of $6,200 on its scale. On petitioner's scale with the de-

fendant Universal it would pay 35% at about $3,500 and 50% at about $5200 (R. 931, 940).

The Paramount Film regional manager testified that the two most important things to an exhibitor are his availability and the terms he has to pay for pictures (R. 523-24). Mr. Field made requests to improve petitioner's sliding scale to representatives at Paramount Film, United Artists, Fox and Universal in 1958. He was able to obtain only a slight improvement of the scale with the respondent Paramount Film, and no improvement in the scale at all with the other respondent distributors mentioned (R. 1321-23).

The petitioner's Paramount Theatre in Salem played after the first suburban run theatres in Lynn, and was called a second suburban run or "sub-sub run." Mr. Field testified that it was the usage in the motion picture business to charge a second sub-run (such as plaintiff's theatre) a lesser percentage of film rental than a first sub-run (such as the first-run theatres in Lynn) (R. 1288-91). Petitioner then offered in evidence tabulations made by Mr. Field listing a number of pictures of the respondent distributors Paramount Film, Warner Bros., Universal and United Artists on which petitioner, contrary to the usage in the industry, was charged the same percentage or a higher percentage of film rental than the first suburban run theatre that played ahead of it (Ex. 77; App. 83-87).

This was significant evidence of conspiracy which the jury was entitled to consider together with the other evidence of conspiracy.

(5) THE COURT BELOW IGNORED THE EVIDENCE THAT EACH OF THE RESPONDENT DISTRIBUTORS ADHERED TO AN ARBITRARY STRUCTURE OF RUNS AND CLEARANCE IN LYNN AND SALEM FOR AT LEAST A DOZEN YEARS.

The record showed that the clearance of first-run Lynn over first-run Salem had been in existence, at least from the late 1940's until 1962. In the *Paramount case* the findings as to conspiracy in regard to run, clearance and admission prices were not based upon direct testimony, but chiefly upon inferences, from the result of long continued practices with a rigid and uniform structure. *United States v. Paramount Pictures, Inc.* (S.D. N.Y.) 66 F. Supp. 323, 343, seq. It is clear that for a clearance to be a reasonable restraint of trade it must be based on the special considerations having to do with the pictures and the theatres involved. *Milgram v. Loew's, Inc.* (3rd Cir.) 192 F. 2d. 579. However, the Fox branch manager admitted that in Lynn the clearance was given to the town, and not to the individual theatres, one-third of the product of the respondents Fox and United Artists played first-run at E. M. Loew's Capitol Theatre in Lynn, with clearance over petitioner's theatre during the damage period. The rigid and arbitrary nature of the structure of runs and clearance is illustrated by the fact that petitioner's theatre was held by Fox after the Capitol Theatre in Lynn, although the Fox branch manager admitted that that theatre was inferior in grossing ability to petitioner's (R. 124).

He also admitted that clearance should be determined on a theatre by theatre basis; but that in Lynn the clearance was given to the town and not to the theatre, and that if the Capitol Theatre had been the only theatre in Town,

probably petitioner's theatre would have been playing ahead of it (R. 119-120, 123). However, if petitioner's theatre had been allowed to play ahead of, or at the same time as the Capitol Theatre, it would have been more difficult for Fox to hold back petitioner after the theatres of respondent exhibitor's in Lynn. Furthermore, Mr. Loew, the licensee of one-third of the Fox and Loew's product at the Capitol Theatre in Lynn, was willing to allow the first-run theatres in Salem to play day and date with the Capitol Theatre, but Fox and Loew's insisted on adhering to the established clearance, although a clearance can only be justified as a reasonable protection to the licensee.*

(6) THE THEATRES OF RESPONDENT EXHIBITORS IN LYNN WHICH PETITIONER WAS REQUIRED TO FOLLOW WERE CONNECTED WITH LARGE NATIONWIDE CHAINS, AND HAD FORMERLY BEEN AFFILIATED WITH TWO RESPONDENT DISTRIBUTORS.

Petitioner has pointed out that Stanley Warner's Warner Theatre and New England's Paramount Theatre in Lynn were part of nationwide theatre chains (see Statement of Facts: *The Parties)* This Court has emphasized the role of large affiliated and non-affiliated chains as motivation for conspiracy in a number of motion picture anti-trust actions. See *United States v. Paramount Pictures, Inc.*, 1948, 334 U.S. 131; *Bigelow v. RKO Radio*

*The final decree in *United States v. Paramount* enjoined the defendants among other things:

"4. From granting or enforcing any clearance against theatres in substantial competition with a theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted . . . . . "

United States v. Paramount Pictures, Inc., S.D.N.Y. 70 F. Supp. 53.

Pictures, 1946, 327, U.S. 251; *Interstate Circuit, Inc. v. United States*, 1939, 306 U.S. 208; *United States v. Crescent Amusement Co.*, 1944, 323, U.S. 173; *United States v. Griffith*, 1948, 334 U.S. 100; *Schine Theatres v. United States*, 1948, 334 U.S. 110.

The existence of the structure of runs and clearance holding petitioner's theatre after theatres of the respondent exhibitors in Lynn, can be traced back to the time when the Warner and Paramount theatres in Lynn were affiliated with the respondent distributors Warner Bros. and Paramount Film, respectively (347, 583-584, 600-601, 622).*

III. The Holding of the Court Below Conflicts Directly with the Second Circuit, which has Held that a Similar Fact Situation as a Matter of Law Constituted a Prima Facie Case of Conspiracy, even where a Jury had already Found that Substantial Competition Existed.

Although petitioner consistently urged in the Court below, and the Trial Court that its evidence of conspiracy was not dependent upon the absence of substantial competition, the Opinion below completely ignores this and holds incorrectly that petitioner principally relied on the absence of substantial competition between Lynn and Salem (Appendix A, 3a). The opinion in the Court below completely ignores ample evidence of conspiracy in the

*Mr. Leonard Goldenson was the president of AB-PT which controlled the respondent New England, and prior to 1950 Mr. Goldenson had been head of the Paramount Theatre Department when New England was affiliated with the respondent Paramount Film (R. 346-347). Paramount Film had direct telephone lines to both the respondent New England and to the former defendant American Theatres (R. 373-374), and Mr. Pinansky the head of American Theatres had formerly been an officer of the respondent New England (R. 1146-47).

record of a nature which the Second Circuit has held to be prima facie evidence of conspiracy, even where a jury had already found as a fact that substantial competition existed. See *J. J. Theatres, Inc. v. Twentieth Century-Fox Film Corp.*, 212 F. 2d. 840 (2d Cir., 1954).

The Court below held incorrectly that petitioner principally relied on the absence of substantial competition between Lynn and Salem (Appendix A, 3a). Petitioner consistently stressed in the Court below, and in the Trial Court that even if the jury were to find substantial competition between Lynn and Salem, there was ample circumstantial evidence of conspiracy which warranted submitting the issue to the jury. Some of that evidence has been outlined in section 2 A. Sub. sections (2) through (6), supra. In addition, the opinion of the Court below completely ignores evidence of conspiracy of a nature which the Second Circuit has held presents a prima facie case, even where a jury had already found as a fact that substantial competition existed. See *J. J. Theatres, Inc. v. Twentieth Century-Fox Film Corp.*, 212, F. 2d. 840 (2d. Cir., 1954).

Irrespective of the extent of competition between Salem and Lynn the evidence is clear that it was the policy of each of the respondent distributors to allow theatres comparable or inferior to petitioner's, and some of which were much closer together than Salem and Lynn, to play day and date on the 21 day availability.

Salem and Lynn were approximately five and one-half miles apart. Each of the first suburban run theatres was less than six miles from one or more of the other theatres which respondents allowed to play day and date on the 21 day availability (409); and many of these first suburban

run theatres which played day and date were only two or three miles apart (R. 411, 876).*

All of the respondent distributors admitted that if other factors were equal the further theatres were apart the less the competition was between them (R. 237, 351-52, 592, 888). Here the record showed other factors were equal, since the areas in which the first suburban run theatres were located were thickly settled suburban areas like Lynn and Salem, and like Lynn and Salem, in those areas a person could not tell when he was going from one town to the other (R. 138, 182, 408, 634, 853-54).

Therefore, since other factors were equal, whatever the extent of competition between Salem and Lynn five and one-half miles apart, those theatres were in much less competition than theatres of chain operators two and one-half to three miles apart that were allowed to play day and date on the 21 day availability. The fact that conditions other than distance were substantially the same in Lynn

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*Various of the respondent distributors testified that the Capitol Theatre in Allston was not in substantial competition with the University Theatre in Cambridge about two and one-half miles away (R. 281, 410, 889) but that Salem and Lynn five or six miles apart were in substantial competition (R. 281, 321, 322, 889). Certain distributors attempted to distinguish why Cambridge and Allston were not in substantial competition. Some of the reasons given are worthy of scrutiny. It was urged that the Charles River was a barrier to competition between Cambridge and Allston, even though there were a number of bridges in the area (R. 410). It was also asserted that no one comes to Cambridge who doesn't live there (R. 152), and that people in the area half way between Cambridge and Allston would not go to the shopping centers in Central Square or Harvard Square to shop (R. 283). No facts were given to substantiate these interesting contentions. The Warner Bros. branch manager found it difficult to determine whether substantial competition existed between theatres of circuit operators in Mattapan and Dorchester, only about two and one-half miles apart; but was quick to assert the self-serving opinion that there was substantial competition between Salem and Lynn at least five and one-half miles apart. (R. 595, 633-34, 831-32, 1317-18). The Trial Court in *J. J. Theatres v. Twentieth Century Fox Film Corp.*, supra commented on this fact that the earlier play of a picture will actually stimulate or create additional patronage in the area.

and Salem, as in those other communities in which various first suburban run theatres were located, is further demonstrated by the testimony of the Universal branch manager. When asked whether distance was the only criterian used in setting up Universal's new Boston releasing plan in 1962 which allowed petitioner to play day and date with Lynn, he answered "what else could I use?" (R. 1005).

It has already been amply demonstrated that petitioner's theatre was physically equal or superior to other theatres playing on the first suburban run, and that there was evidence that it was equal or superior in grossing and revenue producing potential to the first suburban run theatres in Lynn. The record shows that other theatres playing after the theatres in Lynn and Salem were less than one-half plaintiff's seating capacity, and were inferior in other respects also (R. 334-336, 537). There was only evidence of one other theatre in the entire greater Boston area as large as petitioner's theatre that was not allowed to play on first suburban run, and there was no evidence that that theatre was comparable to petitioner's theatre in any other respect except size (R. 537).

Even from this brief outline of the evidence, it is clear, that irrespective of the extent of competition between Lynn and Salem, the jury could infer that if it were not for the conspiracy of the respondent distributors granting priority of run to the respondent exhibitors, petitioner's theatre would have been allowed to play on the first suburban run availability like other first suburban run theatres comparable or inferior to petitioner's theatre, located in similar typically suburban areas, many of which were much closer together than Salem and Lynn. In ignoring this circumstantial evidence of conspiracy

the Court below squarely conflicts with the holding of the Second Circuit in *J. J. Theatres, Inc. v. Twientieth Century Fox*, supra, where it was held that the Trial Court committed reversible error in not submitting to the jury the issue of whether plaintiff was deprived of a non-exclusive (day and date) run due to the conspiracy of the defendants, even though it had already been found by the jury that the plaintiff was in substantial competition with defendant exhibitor's first suburban run theatre (slightly over a mile away) which had priority of run over it.

The language of the Second Circuit in that action is particularly applicable to petitioner's fact situation here:

> "The defendants rested at the close of the plaintiffs' evidence. That evidence, though to a large extent concerned with whether or not there was substantial competition between the two theatres, covered much more ground that that. It tended to show also the suitability of each theatre for the exhibition of first run feature pictures from the standpoint of location, potential patronage, size, appointments, management, admission prices, surrounding transportation facilities, maintenance and the like. This evidence was such that the jury might justifiably have found that the Luxor Theatre was suitable for the exhibition of feature pictures on a first run non-exclusive basis and that if actuated by legitimate business reasons alone a distributor would have selected the theatre for such licensed exhibitions of feature pictures. To this extent the evidence did require the submission of the secondary claim of the plaintiffs in substantial compliance with the requests to charge."

IV. The Court Below Completely Ignores the Fact that Petitioner's Circumstantial Evidence was also Probative of Vertical Conspiracy Between each of the Respondent Distributors and the Lynn Respondent Exhibitors.

The circumstantial evidence of conspiracy outlined in sections II and III supra is not only probative of horizontal conspiracy of respondent distributors with each other, but is equally probative of vertical conspiracy of the respondent distributors with the Lynn defendant exhibitors to hold petitioner after Lynn. The evidence here would also support a finding of vertical and horizontal conspiracy within the same framework, as in *Interstate Circuit v. United States*, 306, U.S. 206, at 219 where this Court stated that the distributors "agreed and conspired with each other and with Interstate to impose the demanded restrictions. . . ."

> "It also concluded that each separate agreement between Interstate and a distributor that Interstate should subject itself to the restrictions in its subsequent run theatres and that the distributors should impose the restriction on all subsequent-run theatres in the Texas cities as a condition of supplying them with its feature pictures, was likewise a violation of the Act."
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> *Interstate Circuit v. United States*, 306 U.S. 206.

In the *Paramount Case* there were involved discriminatory contract provisions which favored the large exhibition circuits. The Supreme Court summarized the lower court's findings as follows:

"The District Court found that the competitive advantages of the provisions were so great that their inclusion in contracts with the larger circuits and their exclusion from contracts with the small independents constituted an unreasonable discrimination against the latter. *Each discriminatory contract constituted a conspiracy between licensor and licensee.* Hence the District Court deemed it unnecessary to decide whether the defendants had conspired among themselves to make these discriminations." (Emphasis Supplied)

United States v. Paramount Pictures, Inc., 334 U.S. 131, at 160.

In *Bordonaro Bros Theatres, Inc. v. Paramount Pictures, Inc.*, 176 F.2d 594 (2nd Cir., 1949) the Second Circuit held that the verdict as to the defendants Paramount and Warner Circuit Management was consistent with the evidence, even though other defendants were acquitted, and went on to say "even a single vertical conspiracy between Paramount, as a distributor and Warner as an exhibitor, would scarcely be outside the scope of the pleadings and proof against such a background. Evidence of vertical conspiracy between distributors and exhibitors has been held sufficient in many other motion picture antitrust cases.*

*In *Paramount Film Distributing Corp. v. Village Theatre, Inc.*, 228 F. 2d. 721 (10 C.A. 1955) it was held to be a question of fact whether Paramount Film conspired vertically with affiliate and an exhibitor to deprive plaintiff of opportunity to play on first run and on day and date run with downtown Salt Lake City and to discriminate in favor of exhibitor against plaintiff. In *Homeward Theatre, Inc. v. Loew's, Inc.*, (Minn. 4 Div.) 110 F. Supp. 398, 407 it was held that "one of the purposes of the establishment of uniformity and the acting in concert in formation of a system of runs and clearances was to grant to the local M.A.C. Theatres a preferred position in runs and clearances presumably because of its size and buying power (p. 407). The language in *Homeward Theatre v. Loew's*, supra was quoted with approval in *Rubenstein, Inc. v. Columbia Pictures Corp.* (Minn. 4 Div.) 176 F. Supp. 527, 532, in sup-

The opinion of the Court below completely ignores the fact that petitioner's evidence was equally probative of vertical conspiracy.

V. There was Ample Evidence of Petitioner's Damage

Although the opinion of the Court below does not discuss the proof of damage in general* there was ample evidence of petitioner's damage. In addition to other evidence set out, the respondent distributors admitted the value of playing pictures on an early availability (R. 270-271, 596, 632, 831, 891) and that if petitioner's theatre had played on first suburban run, its gross receipts would have increased (R. 270-71, 632, 891, 1025). Once the fact of damage has been established, the exact amount of damage need not be proven with certainty so long as the damages are not spectulative or conjectural. *Story Parchment Co. v. Patterson Co.*, 282 U.S. 555 (1931). *Bigelow v. R.K.O.*, 327 U.S. 251 ( ).

In motion picture cases, where the plaintiff complained that he was not able to get product either on the run or on the availability desired, the courts have allowed recovery of damages based either upon a comparison of the receipts of the plaintiff's theatre with those of a comparable house operating on the run or availability desired,

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port of conclusion that defendant exhibitor had a tacit agreement with distributors as to run and clearance in violation with the antitrust laws. In *Fox West Coast Theatres Corp. v. Paradise Theatre* (C.A. 9) 264 F. 2d. 602-8 a verdict was sustained against Fox, Loew's and exhibitor Fox West Coast Theatres. Among other things they said (p. 605): "The verdict found that Fox West Coast had walled off the area where Paradise was erected and claimed dominion. . . . . "

*The opinion of the Court below does point out that the petitioner did not advance a theory of damages specifically addressed to the refusal of the respondents United Artists, Universal, Warner Bros. and Loew's to permit competitive bidding against the first run Lynn theatres (Appendix A, 8a).

or by comparing the receipts and profits of the plaintiff's theatre during the period it was subjected to the impact of the conspiracy with the receipts and profits during the period it was free from the conspiracy.

In this action the petitioner had experienced no period entirely free from the conspiracy during which it was able to secure a regular supply of the product of the respondent distributors on first suburban run; but the theatres of the respondent exhibitors, in Lynn were comparable houses operating on the first suburban run availability which plaintiff desired. Petitioner's theatre was in all respects physically equal or superior to the theatres of the respondent exhibitors in Lynn. It was located, like the theatres in Lynn, in a typical thickly settled suburban area (R. 138, 182, 408, 634, 853-54). On the only two pictures of any defendant distributor which petitioner exhibited day and date with the Warner Theatre in Lynn, petitioner's average gross was approximately 97% of the average daily gross of the Warner Theatre. The Fox branch manager admitted that a day and date exhibition was the best way to tell the comparative grossing abilities of the theatres (R. 223). See also *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.* 190 F. 2d. 951 (2d. Cir. 1951) cert. den., 342 U.S. 926 (1952). Petitioner was not licensed any picture day and date with the Paramount Theatre in Lynn, but the respondent distributors testified that the Warner Theatre and Paramount Theatre in Lynn were equal in box-office grossing ability on pictures of comparable box-office value (R. 247-48, 851). In this action, therefore, a comparison of the receipts of petitioner's theatre with the receipts of the theatres of the respondent exhibitors in Lynn was an

acceptable basis upon which the recovery of damages could be based.

See *Bigelow v. R.K.O. Pictures, Inc.* 327 U.S. 251, 257-258, 266. This method of assessing damages has been also adopted by a number of Circuit Court and District Court decisions in motion picture anti-trust actions. See: *William Goldman Theatres, Inc. v. Loew's Inc.* (E. D. Pa.) 69 F. Supp. 103. *William Goldman Theatres, Inc. v. Loew's, Inc.* (C. A.) 164 F. 2d. 1021. *Milwaukee Towne Corp. v. Loew's, Inc.* (7th Cir.) 190 F. 2d. 561, 566. *Loew's, Inc. v. Cinema Amusements, Inc.* (10th Cir.) 210 F. 2d. 86 cert. den. 347 U.S. 976, 92. *Homewood Theatres Inc. v. Loew's, Inc.* (Minn. 4) Div. 110 F. Supp. 398 App. Dism. 8th Cir.) *Theatre Investment Co. v. RKO Radio Pictures, Inc.* (W. D. Wash.) 72 F. Supp. 650, 656, 657. *Columbia Pictures Corp. v. Rubenstein* C. C. H. Trade Cases ¶69,996.

The annual gross admission receipts at the petitioner's theatre and the theatres of the respondent exhibitors in Lynn during the damage period were as follows (Ex. 69, App. 54-55; Ex. 79, App. 93; Ex 100).

Year	Warner Theatre Lynn	Paramount Theatre Lynn	Paramount Theatre Salem
3/55 to 12/31/55	184,317	195,955	148,101
1956	220,816	245,410	165,155
1957	188,671	259,238	157,379
1958	170,833	215,757	129,271
1959	200,928	206,616	129,107
1960	161,472	174,578	135,453
1961	165,291	173,288	138,252
1/1/62 to 6/26/62	90,216	81,276	70,443

There were in evidence cut-off cards of each of the respondent distributors showing gross admission receipts and film rentals on each picture playing on percentage terms at petitioner's theatre and at the Warner and Paramount Theatres in Lynn (Ex. 13, 27, 28, 46, 47, 48, 56, 57, 58, 96A). Also admitted in evidence was the books of account of the petitioner corporation, which showed, among other things, gross admission receipts and film rentals paid on every picture which played petitioner's theatre from 1955 to 1962 (Ex. 102). Clearly there was ample evidence on which to base a comparison of admission receipts and film rentals at petitioner's theatre with the theatres of the respondent exhibitors in Lynn.*

*The two Universal pictures *Lover Come Back* and *Cape Fear*, which played day and date at petitioner's theatre and at the Warner Theatre in Lynn between April and July of 1962, had an average daily gross of $589 per day, about 97% of the average daily gross at the Warner Theatre. It appeared that the Warner and Paramount Theatres in Lynn were comparable in grossing ability (R. 247-48, 851). The other pictures of the respondent distributors which played at petitioner's theatre during the first six months of 1962 had an average daily gross of $342 per day at petitioner's theatre and an average daily gross of $524 per day at the theatres of the respondent exhibitors in Lynn on first suburban run. These same pictures had an average daily film rental of $116 at petitioner's theatre, and $186 at theatres of the respondent exhibitors in Lynn. Subtracting the average daily film rental from the average daily gross on these pictures results in an average daily gross profit in Lynn of $338, and at petitioner's theatre of $226. Therefore, on the basis of admission receipts and rentals at the theatres of the respondent exhibitors, petitioner's average gross of profit per day on those pictures would have increased $112 if they had been played on first suburban run. On this basis the damage to petitioner from the denial of first suburban run on product of the respondent distributors for the first 6 months of the year 1962 would be $12,768. This is one of the methods that could have been employed by the finder of fact in determining the damage to petitioner based on a comparison of the receipts at petitioner's theatre with the theatres of the respondent exhibitors in Lynn. It could also be found that petitioner's receipts would have been greater than those of the respondent exhibitors in Lynn if petitioner had a regular supply of pictures of the respondent distributors on first suburban run (R. 666-67). *Fanchon & Marco v. Paramount Pictures, Inc.* (S.D. Cal. 100 F. Supp. 84, 93.)

VI. The Opinion of the Court Below Does not Discuss Errors with Regard to Exclusion by the Trial Court of Evidence Relating to both Liability and Damage.

A. The Trial Court Erred in Rejecting Expert Testimony Offered by the Petitioner.

The Court ruled that James Field, general manager of petitioner, was not qualified and excluded his opinion as to increase in gross receipts (R. 1404). He also excluded testimony of another expert witness called by the petitioner.

The authorities are clear that the opinions and computations of experts may be received in evidence on the issue of damages. *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.* (C. A. 8) 194 F. 2d. 594, 597; *Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc.* (C.A. 2) 176 F. 2d. 594, 597; *Rankin Co. v. Associated Billposters* (C.C.A. 2) 42 F. 2d. 152; *Loew's Inc. v. Cinema Amusements, Inc.* (C.A. 10) 210 F. 2d. 86; *Sablosky v. Paramount Film Distributing Corp'n* (E.D. Pa.) 137 F. Supp. 929, 934-6. See also—*Story Parchment Co. v. Patterson Parchment Co.*, 282 U.S. 555 rev'g (1st Cir.) 37 F. 2d. 537.

See also, as to the use of expert testimony in a copyright infringment suit, *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 406-408. It is not necessary that the expert have actual experience in the matter in issue; general knowledge is sufficient. *Neff v. Federal Trade Commission* (4th Cir.) 117 F. 2d. 495, 497. In the *Sablosky Case, supra*, it would seem that the amount of plaintiff's damage was established only by the testimony

of an expert. The plaintiff in *Sabolsky* had no history of prior or subsequent operation free from the conspiracy—that is, they had never exhibited film on territorial release date, without clearance over their theatres in Norristown in favor of Philadelphia—and there was no comparable theatre on the run desired, the receipts from which might be used as a standard.

(1) THE TRIAL COURT ERRED IN REFUSING TO ALLOW JAMES FIELD TO EXPRESS AN OPINION AS TO DAMAGES.

At the time of the trial Mr. Field had been manager of the Paramount Theatre in Salem since 1935, and had lived in Salem or Marblehead all his life. (R. 1180, 1301). He had considerable actual knowledge as to the areas of patronage of that theatre, and the populations in those areas (R. 1300, 1302, 1303).

He was familiar with gross receipts and film rentals on pictures which played his theatre and Lynn theatres during the damage period (R. 1335-36, 1370-72), and had experience with playing product of all respondent distributors day and date with Lynn, when moved up to that availability after the damage period (R. 1371-72). Nevertheless, the Court ruled that the questions put to Mr. Field with regard to increased gross receipts on first suburban run availability were excluded (R. 1404).*

*Field testified that the admission receipts at the Paramount Theatre for the year 1956 were $165,000. If the Paramount Theatre in Salem had access to the product of Fox, Paramount Film, one-half of United Artists and one-half of Universal day and date with Lynn, Mr. Field testified there would have been no change in the policy of operation of the theatre, and that he had an opinion as to whether there would have been an increase in the gross receipts of the Paramount Theatre in Salem (R. 1339). Petitioner's counsel asked him what his opinion was, and counsel for respondents objected (R. 1139-40). The Court ruled that the questions put to the witness were excluded. (R. 1404). Petitioner's counsel indicated that the witness, if allowed to answer the question, would testify in dollars and cents as to what the resulting gross receipts would be (R. 1386).

(2) THE TRIAL COURT ERRED IN REFUSING TO ALLOW RICHARD J. OWENS TO TESTIFY AS AN EXPERT, AND IN RULING THAT HE DID NOT HAVE SUFFICIENT QUALIFICATIONS.

The Trial Court also excluded expert testimony of damage offered by petitioner through Richard J. Owens.* Mr. Owens, with his broad experiences in exhibitor buying and booking for a circuit of 41 theatres (R. 1539-40), knew the value of changes of run and availability in various situations, and was thoroughly familiar with the product of the respondent distributors during the period in issue (R. 1543-47). Certainly this experience alone would have qualified him to give an expert opinion in this action. However, in addition he had been manager of E. N. Loew's Capitol Theatre in Lynn, had bought and booked for his Salem Theatre in Salem, and was thoroughly familiar with the areas from

*Mr. Owens was then asked a hypothetical question by petitioner's counsel. The question was if during the year 1956 the actual gross receipts at the Paramount Theatre in Salem were $165,000 and the actual gross receipts at the Paramount Theatre in Lynn were approximately $245,000 in that same year, and if the Paramount Theatre in Salem had access to the product of the respondent distributors Twentieth Century Fox, Paramount, one-half of United Artists and one-half of Universal on the 21 day availability day and date with Lynn, whether he had an opinion as to whether or not there would be an increase in gross receipts of the Paramount Theatre in Salem. The witness answered that he did have an opinion (R. 1549). Upon objection by counsel for the respondents the Court stated: "Excluded same reason I gave before." (R. 1550). The Court sustained the objection. (R. 1550).

The petitioner offered to prove that the answer would indicate that the gross receipts would increase to about $245,000 (R. 1550). Petitioner offered to prove with each year involved the witness would answer that the gross receipts would be about the same as the Paramount Theatre in Lynn for each year in the damage period in the case (R. 1550-51). It appeared that the gross admission receipts for the Paramount Theatre in Lynn for the remaining years of the damage period were as follows: 1957 $259,238; 1958 $215,757; 1959 $206,616; 1960 $174,578; 1961 $173,288; 1962 (6 months) $81,276; 1955 (April-December) $195,955 (Ex. 69. App. 54-55). See Section V, supra, for annual gross admission receipts of petitioner's theatre.

which theatres in Lynn and Salem drew their patronage (R. 1540-43, 1545-47). If Mr. Owens, with his broad experience as an exhibitor, and his specific knowledge with regard to the product, availability, and drawing area of the theatres in Lynn and Salem, was not qualified to give an opinion, then no one in the New England territory was qualified.

The effect of these rulings was to prevent the expression of an opinion by petitioner's general manager, who was thoroughly familiar with all the details of operation of its theatre, and by a man of great experience in the industry and in the Lynn and Salem areas. Apparently the Trial Judge had the view that no one was qualified to express an opinion. It is therefore suggested that the exclusion of the testimony of these witnesses constituted error. The Court below does not discuss the exclusion of this evidence in its opinion.

B. The Opinion of the Court below did not Comment on the Exclusion by the Trial Court of Copies of a Letter of May 25, 1949 from an Attorney for Petitioner to the Respondents Paramount Film, Warner Bros., United Artists, Fox and Loew's, Inc. (Ex. 67 i.e., App. 49-53).

The petitioner's Ex. 57 Id. consists of five letters sent on behalf of petitioner by James Farley, an attorney, to the respondents Paramount Film, Warner Bros., United Artists, Fox and Loew's, on May 25, 1949 (Ex. 67, App. 49-53). The petitioner had alleged a conspiracy that existed long before it commenced to operate its theatre in 1941, and alleged that this conspiracy in and near Boston, Lynn and Salem had had an adverse effect upon its business. It should have been permitted to prove its

charges. These 1949 letters from Mr. Farley to the respondent distributors were important in showing demand made on the defendant distributors as far back as May 25, 1949; and stating, among other things, that it was in "no practicable competition with Lynn, and that it was entitled to at least an equal availability. These letters should have been admitted, not as proof of the facts they stated, but as a notice of petitioner's claims to the respondents. This demand letter was sent at a time when the Warner and Paramount theatres, which had clearance over plaintiff's theatre, were affiliated with the defendants Warner Bros. and Paramount Film.

The authorities are clear that the temporal and geographical areas of evidence are bounded only by the extent of the conspiracy charged. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690. *American Tobacco Co. v. United States*, 327 U.S. 781, 790, 797. *Bausch Machine Tool Co. v. Aluminum Co.* (C.A. 2) 72 F. 2d. 236, 239 cert. den. 293 U.S. 589.

C. The Opinion of the Court below completely ignores the fact that the Trial Court excluded probative evidence of conspiracy with regard to the Capitol Theatre in Lynn, solely on the ground that that theatre was not operated by a defendant or alleged co-conspirator.

(1) THE TRIAL COURT ERRED IN EXCLUDING DOCUMENTS AND TESTIMONY OF THE FORMER DEFENDANT COLUMBIA PICTURES CORPORATION IN REGARD TO THE CAPITOL THEATRE IN LYNN; AND TABULATIONS PREPARED BY THE PLAINTIFF IN REGARD TO THAT THEATRE.

The cut-off cards of Columbia Pictures Corporation showed that on about 30 pictures played day and date with the Capitol Theatre in Lynn during the period from 1957 to 1962, petitioner's Paramount Theatre out-grossed the Capitol Theatre in Lynn by about 50% and paid about 50% more film rental on the same pictures played day and date. (Ex. 68 Id.; Ex. 80 Id., App. 94-96) Mr. Field, petitioner's general manager, prepared a tabulation showing the gross admission receipts and film rental on each day and date engagement at petitioner's theatre and at the Capitol Theatre in Lynn (Ex. 80 Id. App. 94-96). These cut-off cards and the tabulations were excluded by the Court. (Ex. 80 Id., App. 94-96). The Court also ordered struck, on motion by the respondents, all testimony of Mr. O'Brien with regard to the Capitol Theatre in Lynn (R. 1131-34). Mr. O'Brien had testified that in his opinion as branch manager of Columbia it was reasonable for petitioner's theatre to play day and date on first suburban run with the Capitol Theatre in Lynn,

and that he thought that it was in the best business interest of Columbia from a money standpoint (R. 1093-94).

The petitioner's theatre was a better grossing theatre than the Capitol Theatre in Lynn, as the Fox branch manager had admitted (R. 124). Nevertheless, the respondents Fox and United Artists for the entire damage period, and the respondent Loew's for about sixteen months of the damage period, served one-third of their product to the Capitol Theatre with clearance over plaintiff's theatre. Obviously the records of Columbia showing that petitioner's theatre was out-grossing the Capitol Theatre by 50% on day and date pictures, and playing 50% more film rental (Ex. 80 Id., App. 94-96) were relevant and probative, on the issue of whether these respondents were acting in their best business interests in granting the Capitol Theatre clearance over plaintiff, and in adhering to the structure of runs and clearance.

It is abundantly clear that the Columbia gross receipts and film rentals of pictures at the Capitol Theatre which played day and date with petitioner should have been admitted in evidence, on the issue of both liability and damage. The relative grossing ability of petitioner theatre, and theatres of the respondent exhibitors, as compared to the Capitol Theatre, was a matter of the weight of the evidence, and not its admissibility. *William Goldman Theatres, Inc. v. Loew's, Inc.* (E. D. Pa.) 69 F. Supp. 103. *Loew's, Inc. v. Cinema Amusements,* (10th Cir.) 210 F. 2d. 86 cert. den. 347 U.S. 976. *Theatre Investment Co. v. RKO Radio Pictures, Inc.* (W. D. Wash.), 72 Supp. 650.

Apparently, the trial judge adopted the theory that

since Mr. E. M. Loew, the operator of the Capitol Theatre, was not alleged to be a co-conspirator, the dealings of Columbia or even any respondent distributor for the Capitol Theatre had nothing to do with the case. (R. 1129, 1131-34).

Plaintiff alleged a conspiracy in and near Boston, Lynn and Salem, which had an adverse impact upon its business. It should have been permitted to prove its charges. *Continental Ore Co. v. Union Carbide & Carbon Corp.* 370 U.S. 690.

(2) THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY AND DOCUMENTARY EVIDENCE OF RESPONDENT DISTRIBUTORS OFFERED BY PETITIONER IN REGARD TO THE CAPITOL THEATRE IN LYNN.

The Court excluded cut-off cards and contracts of United Artists and Loew's with regard to the Capitol Theatre in Lynn (Ex. 17 Id., 18 Id.; R. 278-81; Ex. 96 B Id.; Ex. 23 Id). However, it appeared that United Artists licensed about one-third of its product during the damage period to the Capitol Theatre in Lynn, and that that theatre was granted clearance over petitioner's on United Artists' product which it played during the damage period (R. 819). Obviously this evidence was relevant and admissible to the charges of conspiracy made by petitioner. The cut-off cards and contracts of Loew's for the Capitol Theatre in Lynn for the period up to July, 1956, when petitioner was playing Loew's product first run in Salem, were clearly admissible for the same reasons. (R. 318). Loew's continued to serve the Capitol Theatre in Lynn

one-third of its product from mid-1956 through 1962 with clearance over the Salem Theatre in Salem. Petitioner charged a conspiracy of the defendants involving a structure of runs and clearance in and near Boston, Lynn, and Salem. There was no withdrawal by Loew's after 1956 from this structure; petitioner simply was not playing its product first run in Salem. It is fundamental conspiracy law that any party to a conspiracy is liable for everything done during the period of its existence, regardless of the extent of his participation. *Kellogg Co. v. National Biscuit Co.* (M.M.) 38 F. Supp. 643. *Dextone Co. v. Building Trades Council* (2d Cir.) 60 F. 2d. 47. See also *Charles Rubenstein, Inc. v. Columbia Pictures Corp.* (Minn 4 Div.) 154 F. Supp. 216, 219, 220. *Lefco v. United States* (3rd Cir.) 74 F. 2d. 66.

The objection of respondents to the admissibility of records of the Capitol Theatre was directed to the defendant Loew's, because petitioner had not played its product in Salem since mid-1956, and for that reason no objection had been made to the admissibility of Fox records for the Capitol which had been admitted the previous day, petitioner having played Fox product during the entire damage period (R. 291-92). However, apparently the Trial Court adopted the theory that nothing with regard to the Capitol Theatre had anything to do with the case (R. 1131-34).

VII. The Opinion of the Court Below Conflicts with Established Standards Imposed by This Court on Appellate and Trial Courts in Determining Motions to Dismiss and for Directed Verdicts in order to Insure the Right to Trial by Jury.

The decision of the Court below is in direct conflict with *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), *Continental Ore Co. v. Union Carbide & Carbon Corp.* 370 U.S. 690, (1962) and *Poller v. Columbia Broadcasting Co., Inc.* 368 U.S. 464, and with the Seventh Amendment which guarantees any litigant a right to a trial by jury. Petitioner was deprived of this right to a trial by jury by the Court below.

Beacon Theatres, Inc. v. Westover, supra pointed out that "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. More recently in *Poller v. Columbia Broadcasting System, Inc.*, supra this Court stated that 'We believe that summary procedures should be used sparingly in complex anti-trust litigation where motive and intent play leading roles, the proof is largely in the hands of alleged conspirators and hostile witnesses thicken the plot," and went on to say . . . that trial by jury has "so long been the hallmark of 'even handed justice'." (at 473).

In the present case petitioner had abundant evidence of conspiracy which fell into a number of categories or types of evidence which have been approved by this Court and other Courts of Appeal. Although some of these categories are of a nature which would support an inference of conspiracy, even standing alone, in evaluating the full probative value of petitioner's evidence, petitioner was

entitled to have this evidence, much of which was interrelated, viewed as a whole, and not examined piecemeal. The importance of this concept has been emphasized by this Court in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, supra. In *Theatre Enterprises v. Paramount*, 346 U.S. 537, at 541-542, this Court, in holding that petitioner was not entitled to a directed verdict in his favor, pointed out that the controverted evidence of conspiracy raised an issue for determination by the jury.

It is difficult to conceive of more probative circumstantial evidence of conspiracy in a private antitrust case. The trial court generally cut off discovery and evidence at 1950, although petitioner complained the conspiracy had been in effect when it commenced operating its theatre in 1941 (R. 1089-90). However, petitioner was able to prove the structure of runs and clearance, holding petitioner's theatre after Lynn, was in existence back to 1950, a time when the theatres of the Lynn respondent exhibitors were affiliated with respondents Paramount Film and Warner Bros. Rigid and arbitrary structures of this nature, favoring affiliated theatres, and discriminating against independent exhibitors, were one of the chief vices condemned by this Court in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131.* The record shows the continuance of the structure, holding petitioner behind Lynn, after the divestiture of the theatres, and their acquisition by nationwide chains.

The record contained ample evidence of a nature which this Court and other Circuit Courts of Appeal have held warrants an inference of conspiracy. As has been already

*The excluded letters by Attorney Farley showed written demand by petitioner for first suburban run at a time when the affiliation still existed (Ex. 67 Id., App. 49-53).

demonstrated, there was evidence: that petitioner's theatre was held behind theatres of Lynn respondent exhibitors with which it was not in substantial competition; that the conduct in holding petitioner behind Lynn was contrary to respondent distributors' best business interest, and was contrary to their policy in the Boston suburban area of allowing similar, or even less favorably situated, theatres to play day and date on the first suburban run; that the respondent distributors either refused to allow petitioner to bid, or conducted bidding unfairly; and that the respondent distributors discriminated against petitioner and in favor of the Lynn respondent exhibitors in the film rentals charged. The evidence was equally probative of vertical, as well as horizontal conspiracy. Without considering the excluded evidence of damage (expert testimony and grosses and rentals on pictures of Columbia played day and date with the Capitol Theatre in Lynn) the record contained ample evidence of petitioner's damage from the conspiracy of the respondents.

Petitioner's case was the third consecutive private antitrust action in which the Court below had affirmed direction of a verdict by the trial court, *Brown v. Western Massachusetts Theatres, Inc.*, 288 F. 2d. 302 (1961) and *Winchester Theatre v. Paramount*, 324 F. 2d. 652, being the two prior cases. Perhaps some of the errors of the Court below were in part due to an inability to distinguish the facts in the instant case from those in *Winchester* and *Brown*, supra.

Respondents had urged below that this case was identical to the *Winchester Case*. Nothing could be further from the fact, however, the Court below concludes its opinion by stating "Consequently plaintiff (petitioner here) must be regarded as just another exhibitor commercially

disappointed in not having received better treatment." (Appendix A, 10a-11a). Nevertheless, the record in the *Winchester Case*, supra, contained none of the evidence which petitioner had, but only bare conscious parallelism. In *Winchester* the Court below specifically pointed out that there was no evidence of conduct against best business interest, and that plaintiff's Winchester Theatre was inferior in size grossing potential to the Malden theatres it was held behind. The record in the instant case contained ample evidence of conduct against best business interest of respondents, and that petitioner's theatre could gross even more than the Lynn exhibitors, in addition to other evidence outlined. Even the Court below concedes that petitioner's theatre was comparable as to size and appointments and at least concedes "there was also evidence from which the jury could conclude that petitioner's theatre was capable of grossing as much as the defendant theatres" (Appendix A, 7a). Likewise, in the present case there was evidence that the favored theatres were connected with large theatre chains, a motivation which the Court had pointed out was absent in the Winchester Case. The result reached by the Court below, would appear due, partly at least, to an inability to distinguish the facts in the instant case from its prior decision in *Winchester*, supra.

We respectfully urge that the Court below did not review the evidence as a whole, did not allow the petitioner the benefit of all its evidence, did not draw the inferences and presumptions which could be drawn from the evidence in favor of petitioner, against whom the verdict was directed, did not construe all the presumptions in favor of petitioner and did not resolve all doubts in favor of petitioners. A reading of the opinion of the Court below,

with the apparent disagreement within the Court itself as to the probative effect of petitioner's evidence, and the steps undertaken by the Court to rationalize the evidence to reach the conclusion it did reach should be sufficient to point out that there was a serious conflict in the evidence. That the Court below was not convinced of the conspiracy charged is not material. That the Court below might feel that it would have ruled for the respondents has been sitting without a jury as a trier of fact if immaterial. The conclusion is inevitable that there was a conflict of evidence and that petitioner was entitled to have this issue determined by the jury.

If this decision were allowed to stand it would so severely limit the private antitrust action in the First Circuit as to cripple it as a device for the enforcement of the antitrust laws, thereby expanding the litigation task of the Department of Justice and, consequently, increasing the burden on this Court in the field.

CONCLUSION

For the foregoing reasons the petition for a Writ of Certiorari ought to be granted.

Dated August 13, 1965.

Respectfully submitted,
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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6352.

NAUMKEAG THEATRES CO., INC.,
Plaintiff, Appellant,

versus

NEW ENGLAND THEATRES, INC. ET AL.,
Defendants, Appellees.

Appeal From The United States District Court
For the District of Massachusetts

Before Woodbury, *Chief Judge*, Aldrich, *Circuit Judge*, and Caffrey, *District Judge*.

W. Bradley Ryan, with whom *Barry R. McDonough* was on brief, for appellant.

Robert W. Meserve, with whom *Dana C. Coggins*, *Stuart Aarons*, *Richard L. Brickley*, *Nutter, McClennen & Fish*, and *Brickley, Sears & Cole* were on brief for appellees.

OPINION OF THE COURT

May 25, 1965.

ALDRICH, *Chief Judge.* This is a moving picture private anti-trust action in which the primary question is whether the evidence, including any which we may find the district court wrongfully excluded, entitled, or would have entitled, the plaintiff to go to the jury. The district court directed a verdict for the defendants at the close of plaintiff's case on the ground that no conspiracy had been shown. Plaintiff appeals.

The plaintiff, Naumkeag Theatres Co., Inc., operates the Paramount Theatre in Salem, Massachusetts. Defendant appellees are six national distributors of motion picture films,[1] and New England Theatres, Inc., and Stanley Warner Management Corp., operators of the Paramount and Warner Theatres, respectively (hereinafter defendant theatres), in Lynn, Massachusetts. The damage period is March 1955 to July 1962. Lynn is about twelve miles from the center of Boston, and Salem about five miles beyond Lynn. Both cities are rather densely populated, with Lynn more than twice as large, but the boundary between them is indistinct. Defendant distributors gave their first run, and a 21-day clearance, to downtown Boston. Lynn, and a number of other cities close to Boston, were thereafter entitled to the first suburban run, so-called, followed immediately by the plaintiff. Except for one theatre with whom plaintiff had made a private arrangement all theatres in plaintiff's competitive

[1] Metro-Goldwyn-Mayer, Inc. (formerly Loew's, Inc.); Paramount Film Distributing Corp.; Twentieth Century-Fox Film Corp; United Artists Corp.; Universal Film Exchanges, Inc., and Warner Bros. Pictures Distributing Corp.

area except defendant theatres were for most of the damage period subject not only to an availability behind plaintiff, but to a seven-day clearance in plaintiff's favor.[2] It stands essentially conceded that plaintiff's theatre was on a par, so far as size and excellence of appointments are concerned, with defendant theatres. Plaintiff complains of its assigned special, in-between position after Lynn, and asserts that it should have been in no way subordinate.

Admittedly there was no financial interest or connection between any of the defendants. Admittedly, too, there was no direct evidence of any conspiracy. On the other hand, a majority of the court, at least, is unpersuaded by defendants' claim that there was not even any evidence warranting a finding of "conscious parallelism." This argument, that it did not appear that any distributor knew what the others' decisions "would be" at the time when it made its own decisions, overlooks the obvious fact that decisions (to act or not to act) are made continuously and not once for all. A defendant at all times could look at the past inactivity of its competitors and eventually draw conclusions that if it did not change, neither would they. Defendants' contention is in reality a semantic attempt to say that there is no such thing as conscious parallelism. However, conscious parallelism is concededly not enough. *Brown v. Western Massachusetts Theatres, Inc.*, 1 Cir., 1961, 288 F.2d 302; *Winchester Theatre Co. v. Paramount Film Distributing Corp.*, 1 Cir., 1963, 324 F.2d 652. Plaintiff's burden is to show that there was evidence warranting a finding of something additional

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[2]The plaintiff, in other words, was far from the "ashcan" run of which the plaintiff complained in *Winchester Theatre Co. v. Paramount Film Distributing Corp.*, 1 Cir., 1963, 324 F.2d 652.

from which a reasonable inference of conspiracy may be made, or, as it puts it, of conscious parallelism "plus."

The "plus" contention on which plaintiff has principally relied is that it was held behind defendant theatres even though it was not in substantial competition with them. We start here with the principles that the whole system of runs and clearances, contrary to what might appear at first blush, purposely, and legitimately, discriminates between competing exhibitors. By this means distributors hope to reach the largest number of viewers with the smallest number of prints, enable early-run theatres to charge premium prices, and to receive the benefit of word-of-mouth advertising. See *United States v. Paramount Pictures, Inc.*, D.C.S.D.N.Y., 1946, 66 F.Supp. 323, 341-42, *rev'd on other grounds*, 334 U.S. 131; *Fanchon & Marco v. Paramount Pictures, Inc.*, D.C.S.D.Cal., 1951, 100 F. Supp. 84, 89, 92. The reverse follows, that discrimination in the absence of competition may be a ground for suspicion.[3] See *Theatre Enterprises, Inc., v. Paramount Film Distributing Corp.*, 1954, 346 U.S. 537, 540; *J. J. Theatres, Inc. v. Twentieth Century-Fox Film Corp.*, 2 Cir., 1954, 212 F.2d 810. The first inquiry, accordingly, is whether it could have been found that plaintiff and the defendant Lynn theatres were not in competition.

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[3]Unlike the matter of clearance between theatres, which can be justified only if there is substantial competition between the theatres, *United States v. Paramount Pictures, Inc.*, 1948, 334 U.S. 131, a distributor might have independent business reasons for setting up a simple priority of run between non-competing theatres. The not insubstantial cost of an extra print which might be made necessary by a policy of simultaneous showings might outweigh any advantages to be gained. However, the parties seem to have regarded this as a matter of affirmative defense, not yet made. Since we conclude that the evidence showed substantial competition as a matter of law, we may accept, for the purposes of this appeal, the assumption made in this footnoted sentence.

Consideration of all of those portions of the record that have been called to our attention[4] satisfies us that a finding of no substantial competition between plaintiff and the defendant Lynn theatres would not be warranted.[5] It is true that plaintiff's manager, Field, expressed the conclusory statement that none existed. However, he repeatedly testified to specific matters incompatible with that generalization. For example, although he gave the opinion that defendant Lynn theatres would not have lost customers to plaintiff had plaintiff played "day and date," while plaintiff would have made substantial gains in patronage, he conceded that, except for the other major theatre in Salem which enjoyed equal availability with plaintiff and presumably would continue to do so if plaintiff were moved up, plaintiff already had a priority over neighboring theatres other than those of the Lynn defendants. He also admitted that the difference between 28 days behind Boston and 21 was not in itself serious, but drew significance only from the fact that it meant Lynn was playing films a week before Salem. There was no evidence to the contrary. It in no way appears, in other words, how plaintiff would have drawn more customers from these theatres other than Lynn, had it been moved up with Lynn, unless these other theatres had been left where they were, *i.e.*, with an even larger clearance in plaintiff's favor.

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[4]This court will read all of a short record irrespective of what is specifically cited in the briefs, but, following a practice adopted by Judge Wyzanski in *United States v. United Shoe Machinery Corp.*, D.C.D. Mass., 1950, 93 F.Supp. 190 *aff'd on other grounds*, 347 U.S. 251, will not necessarily examine uncited parts of long records even though they have been furnished.

[5]It is to be noted that plaintiff's burden of showing absence of competition is heavier than it would be if defendants had held it subject to a clearance, as distinguished from a mere subsequent run. See *United States v. Paramount Pictures, Inc.*, 1948, 334 U.S. 131, 145-47.

Furthermore, at various times Field even more specifically contradicted his own conclusions. Lynn, he acknowledged was his "big loss." Salem residents, as well as those of Peabody and Marblehead, an "important part" of his patronage, were, "other things being equal," by which he quite apparently meant "day and date" showing, as likely to go to the movies in Lynn as in Salem. While normally the circumstance that a witness contradicts himself merely leaves an issue of fact for the jury, to permit this in some instances "would result in a mockery of justice." See *Solomon Dehydrating Co. v. Guyton*, 8 Cir., 1961, 294 F.2d 439, 443, *cert. den.* 368 U.S. 929. While not suggesting a mockery in this case, we cannot, on the record as a whole, find that Field's favorable testimony made out enough on this issue to warrant a verdict in plaintiff's favor to stand.[6] *Cf. Dehydrating Process Co. v. A. O. Smith Corp.*, 1 Cir., 1961, 292 F.2d 653, 656, *cert. den.* 368 U.S. 931; *Solomon Dehydrating Co. v. Guyton, supra.* An ultimate conclusion not only unsupported by, but contradictory to the subsidiary facts cannot stand, whether reached by a jury or expressed by a witness. See *Inter-*

[6]We may observe that plaintiff's principal damage claim is that if allowed to play day and date with Lynn it would have grossed as much as the defendant theatres. This in itself is not inconsistent with its substantive claim that there is no substantial competition between Lynn and Salem. However, lacking such competition it leaves unanswered the question where the additional customers would have come from. In keeping with a certain ambivalence on its part (as must be clear from our opinion in its entirety) plaintiff in its reply brief suggests that damages might be computed by "pooling" and redistributing Lynn's gross and plaintiff's, citing *Columbia Pictures Corp. v. Charles Rubenstein, Inc.*, 8 Cir., 1961, 289 F.2d 413. Indeed, Field conceded in his deposition that if plaintiff played day and date with Lynn, plaintiff's expected gross increase of 30 to 50% "would probably come out of the Lynn theatre gross but at least it would keep Salem people in Salem." It would obviously be inconsistent to predicate liability on the theory that the Salem Theatres playing day and date with Lynn would have drawn no substantial amount of patronage from Lynn, and permit damages to be awarded solely on the theory that by playing ahead of Salem the Lynn theatres drew patronage that would otherwise have been plaintiff's.

national Paper Co. v. United States, 5 Cir., 1955, 227 F.2d 201, 205, and cases cited therein.

We find plaintiff's contention that placing it behind Lynn was contrary to defendant exhibitors' best financial interests, independently considered, totally unsubstantiated. That is, it in no way appears how any distributor could have improved its profits simply by putting plaintiff on the same run as the defendant theatres. Nor can plaintiff make anything of the fact that defendants never did any "experimenting," in the absence of any showing that defendants had reason to suppose that a change would be financially profitable. It is true defendants never made any surveys of the patterns of patronage in the Lynn-Salem area. Neither did plaintiff. If the status quo was reasonable it did not become unreasonable because defendants failed to experiment to see if something else might also work, or conceivably, might work better.

We turn to a quite different matter, that of competitive bidding. In January 1958 plaintiff wrote to each of the defendant distributors what it since calls its "bid of negotiate" letter. It must be conceded that this letter could have been better expressed. Two defendants, Paramount and Fox, viewed it as a request not only for equal availability with Lynn, but, alternatively, for the opportunity to bid competitively for the first suburban run. They responded by permitting plaintiff to bid against the defendant theatres on individual pictures, although plaintiff claims the bidding was not conducted fairly. A third defendant, Universal, wrote plaintiff and asked if the letter was a request for bidding. According to plaintiff's manager, Field, he replied orally that it was. Universal took no further action. The three other defendants testified,

without affirmative contradiction, that they did not construe the letter as a request to be allowed to bid.

As for the two defendants which did permit bidding, plaintiff was able to win only a few Fox films, reputedly of low box office value, and no Paramount films. In response to a question from the court as to whether anything Paramount did caused the lack of success, Field responded, "No, it was circumstance. We just didn't what you might call stretch for them and bid a substantial amount of money." Nevertheless, plaintiff offered evidence that on six Paramount pictures and four Fox pictures application of the percentage terms bid by the plaintiff to the actual gross earned by the defendant theatres would have produced a somewhat higher film rental to the distributor. There was also evidence from which a jury could conclude that plaintiff's theatre was capable of grossing as much as the defendant theatres. See *Bordanaro Bros. Theatres, Inc. v. Paramount Pictures, Inc.*, 2 Cir., 1949, 176 F.2d 594, 597. Field's statement, amounting in substance to an opinion as to the fairness of Paramount's treatment of plaintiff's bids, would not conclude the plaintiff in the face of contradictory evidence even if we construe it as an admission.

On its face, a refusal to permit competitive bidding, or the unfair conduct of permitted, bidding, as another road "home," *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 3 Cir., 1961, 297 F.2d 199, 204, *cert. den.* 369 U.S. 839, would appear to constitute action against individual business interest from which a jury may infer conspiracy. *Milgram v. Loew's, Inc.*, 3 Cir., 1951, 192 F.2d 579, 583, *cert. den.* 343 U.S. 929; see *Bigelow v. RKO Radio Pictures, Inc.*, 1946, 327 U.S. 251, 256, 262; *J. J.*

Theatres, Inc. v. Twentieth Century-Fox Film Corp., 2 Cir., 1954, 212 F.2d 840. Plaintiff does not seek to recover damages on the basis of such a conspiracy. With respect to the four distributors that refused to accept bids, it did not, and could not, show what successful bidding would have cost it. With respect to the others no attempt was made to show how much plaintiff lost by playing the pictures it did instead of the films on which it contends it submitted a high enough bid to entitle it to win. Plaintiff's apparent intention in offering evidence of a concerted refusal to permit effective bidding was only to help lay the basis for a further inference of a concerted refusal to play day and date.

If we were to accept plaintiff's contention that the Lynn and Salem theatres were not in substantial competition, the only connection it could claim between the two alleged conspiracies would be that it is more likely that a group of defendants have conspired against a plaintiff in one respect if they have conspired against it in another. This does not seem sufficient, with regard to the first alleged conspiracy, to constitute conscious parallelism "plus."[7] However, defendants cannot, with respect to the first conspiracy, have it that there was substantial competition between Salem and Lynn, and then take the opposite position as to the second. Having persuaded us, as previously stated, that the record compelled a finding of competition, we must consider the balance of the case in the same light. A substantial reason suggests itself why defendant distributors might, if plaintiff was a competitor of defendant

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[7]Indeed, a showing that the defendants were not willing to have plaintiff bid for the films negates one possible motivation for the alleged conspiracy to refuse day and date availability, namely, to force plaintiff to bid for the films against the Lynn theatres.

theatres, want to discriminate against plaintiff, namely, the protection of their market. Evidence solicited, it so happens, by the defendants from a representative of one distributor was that a shift of revenue from Lynn to Salem might be "a very decided disadvantage [to the distributor] in the fact that Lynn, like most theatres of that kind, are high overhead theatres, they have a high operating expense, and my experience has shown that sometimes it wouldn't take too much of a drop of revenue to put the theatre in very bad condition, almost to the point of going out of business . . . Well, it made no difference to me where we got the money [from film rentals] . . . It made a difference in the overall in the event that Salem, playing day and date, would affect our revenue in Lynn. It made a difference in that respect. The possibility of jeopardizing our position with Lynn, jeopardizing it to the extent that the amount of business that was lost would possibly eliminate that theatre as a substantial source of revenue for our company."

There is, however, no point in pursuing this matter. The majority of the court is of opinion that the defendants' divergent responses to the "bid or negotiate" letter show such a departure from parallelism, conscious or otherwise, as not to constitute an adequate "plus" factor. They believe that the ambiguity of this letter,[8] must be

[8] "Gentlemen:-

"The Naumkeag Theatres Company hereby requests that film be made available for the Paramount Theatre, Salem, twenty-one (21) days after Boston showing.

"We make this request because experience indicates we are being damaged by our competitors in this general area. It is clear that they have an unfair advantage over us in that you make film available to them many days ahead of our theatre.

"This is especially true of the situation in Lynn. Our grosses have compared favorably with Lynn even when film has been made available to both cities at the same time. Given the opportunity to bid, our theatre is capable of matching or exceeding the grosses of other theatres in our competitive area.

"Could we hear from you on this matter as soon as possible?"

resolved against the writer, particularly when it is the alleged fulcrum of an anti-trust claim, and that there was an unmet burden upon the plaintiff to show that the defendants' varying responses were not *bona fide*, either as to their understanding, or as to being a concerted refusal. They point to the fact that there was at the time a "split of product" arrangement between plaintiff and another Salem theatre, as a result of which plaintiff was not exhibiting films of two of these distributors, and that plaintiff should have stated affirmatively that it would abandon this arrangement to the extent that it was able to secure the first suburban run. The writer of this opinion disagrees, believing that the jury was the one which should have resolved the ambiguity in the "bid and negotiate" letter, that plaintiff's intent to abandon its split-of-product arrangement was implicit, and that the jury could have found that all defendants consciously and concertedly, though by different routes, refused the plaintiff's request to bid in order to benefit Lynn.[9] However, competitive bidding aside, the court is unanimous in believing that placing the plaintiff behind Lynn was plainly commercially justified and that there is nothing else to support an affirmative finding of illegal conspiracy. Consequently, plaintiff must be regarded as just another exhibitor commercially disappointed in not receiving better treatment, as in *Winchester Theatre Co. v. Paramount Film Distributing Corp.*, 1 Cir., 1963, 324 F.2d 652.

We have considered all of plaintiff's evidentiary points. No error appears that could affect the basis of this decision.

Affirmed.

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[9]It would seem clear that Lynn would not be, and could not be expected to be, benefited in any worth while amount unless all distributors refrained from effectively compelling it to bid.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6352

NAUMKEAG THEATRES CO., INC.,
Plaintiff, Appellant,

versus

NEW ENGLAND THEATRES, INC., ET AL.,
Defendants, Appellees,

JUDGMENT

May 25, 1965

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
Roger A. Stinchfield
Clerk.

[cc: Messrs. Ryan, Meserve, Collins and Brickley.]

APPENDIX C

Section 1. Sherman Act

July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; August 17, 1937 Chap. 690, Title VIII, 50 Stat. 693; July 7, 1955, Public Law 135 84th Congress, First session; 15 U.S. Code Sec. 1.

> Every contract, combination in the form of trusts or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . . [Proviso omitted]

Section 2. Sherman Act

July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209; July 7, 1955, Public Law 135, 84th Congress, First Session; 15 U.S. Code, Sec. 2.

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding $50,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

Section 4. Clayton Act

October 15, 1914. Chap. 323 Sec. 4 38 Stat. 731, 15 U.S. Code, Sec. 15.

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

CONSTITUTION OF THE UNITED STATES AMENDMENT VII — CIVIL TRIALS

In truths at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be reserved, and no fact tried before a jury, shall be otherwise re-examined in any court of the United States, then according to the rules of common law.

APPENDIX D

The following are some pictures of Paramount Film and Fox on which an application of the percentage terms bid by the petitioner to the actual gross of the first suburban run theatre in Lynn which was awarded the picture on first suburban run, produces a greater film rental than was paid by the theatre in Lynn:

Title	Paramount Lynn Gross	Lynn Film Rental	Percentage Bid by Plaintiff	Application Plaintiff's Bid to Lynn Gross
Paramount Film				
G.I. Blues	$6,147	$1,799	25-50% SS	$2,998
Rock-A-Bye Baby	$4,415	$1,264	30-35% SS	$1,475
Vertigo	$5,476	$2,088	25-50% SS	$2,613
Geisha Boy	$5,570	$1,355	35-35% SS	$1,647
Don't Give Up the Ship	$6,437	$1,371	25-35% SS	$2,182
Fox				
Diary of Anne Frank	$4,481	$1,568	25-50% (App. 106)	$1,792
Snow White & the Three Stooges	$3,473	$ 336	25-50% SS	$1,004
Best of Everything	$4,799	$1,609	25-50% SS	$1,954

APPENDIX E

STATEMENT OF QUESTIONS INVOLVED

The appellant suggests that the questions involved in this action are whether or not the court erred:

I. In allowing the motions of the defendants, for a directed verdict, in directing a verdict for the defendants, in directing that judgment be entered for the defendants, and in entering judgment for defendants.

II. In excluding the following evidence offered by the plaintiff:

(a) Contracts and cut-off cards of Columbia Pictures Corporation originally a defendant, but dismissed on plaintiff's motion prior to trial, in regard to the Capitol Theatre in Lynn, and testimony of a representative of Columbia Pictures Corporation with regard to that theatre.

(b) Testimony and documentary evidence of the defendant distributors offered by plaintiff in regard to the Capitol Theatre in Lynn.

(c) Tabulations prepared by the plaintiff in regard to the Capitol Theatre in Lynn (Ex. 80 id. App. 94-96).

(d) Expert testimony offered by the plaintiff.

(e) Letters on behalf of plaintiff dated May 25, 1949 to five of the distributor defendants from James Farley, an attorney (R. 1087-90; Ex. 67 id., App. 49-53.)

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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 474.

NAUMKEAG THEATRES CO., INC.,
Petitioner,

v.

NEW ENGLAND THEATRES, INC., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Opinion Below.

The opinion of the Court of Appeals for the First Circuit (Pet. App. A) is reported at 345 F. 2d 910 (1965).

Questions Presented for Review.

The substance of the plaintiff's six "Questions Presented" (Pet. 2-4) can be summarized as actually presenting for review by this Court only the following:

1. Whether the Court of Appeals was not fully warranted in affirming the judgment of the District Court in a private anti-trust action in which the District Court directed a verdict for the defendants where at the trial the plaintiff adduced no evidence, direct or circumstantial, from which a jury could find any conspiracy in violation of the anti-trust laws, but, on the contrary, the evidence clearly showed that the action of the defendants was commercially justified for independent business reasons common to each of them.

2. Whether certain evidentiary rulings by the trial judge were error or the exercise of permissible discretion where such rulings involved the exclusion of (*i*) evidence offered by the plaintiff relating to a non-defendant theatre not shown to be fairly comparable to the theatres of the defendant exhibitors, (*ii*) opinions of so-called "expert" witnesses who were not qualified and whose proffered testimony on the subject of damages was based on nothing more than speculation or guesswork contrary to the evidence, and (*iii*) certain letters which were written six years prior to the period for which plaintiff seeks damages and were of a self-serving character.

Statutes Involved.

The pertinent provisions of Sections 1 and 2 of the Sherman Act (15 U.S.C. Sections 1 and 2) and of Section 4 of the Clayton Act (15 U.S.C. Section 15) are set forth in the petition at pages 75-77.

Statement of the Case.

This is a private motion-picture anti-trust action in which the plaintiff (the petitioner here), being dissatisfied

with its relative playing position in the Lynn-Salem, Massachusetts, competitive area—which generally resulted in its playing twenty-eight days after first-run Boston—charges (PR 1-29*) the defendants with conspiring against it in denying it the playing position, or "run," which it desired—which would have permitted it to play twenty-one days after Boston (PR 1434). The period for which the plaintiff seeks damages is March, 1955, to July, 1962 (PR ii, iv). A verdict was directed for all defendants by the Trial Court, and judgment was entered thereon (PR 1571-1572; 36). The judgment of the Trial Court was affirmed by the Court of Appeals (Pet. App. B).

Throughout the period in question the plaintiff operated the Paramount Theatre in Salem, Massachusetts (PR 1181). Defendants are six distributors† of motion-picture films and two exhibitors‡ of motion pictures in the City of Lynn, Massachusetts. Admittedly, there was no ownership interest or affiliation between any of the defendants (345 F. 2d at 911).

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*In this brief, references (*i*) to the petition will sometimes be indicated by the prefix "Pet.," (*ii*) to the Record Appendix to the Appeal Brief for Appellant (vols. 1-5) by the prefix "PR," (*iii*) to volume 6, the Exhibit Volume, of the Record Appendix to the Appeal Brief for Appellant by the prefix "V6," and (*iv*) to the Record Appendix to the Appeal Brief for Appellees by the prefix "DR."

†Metro-Goldwyn-Mayer, Inc., formerly Loew's, Incorporated ("M.G.M.") (PR 224), Paramount Film Distributing Corporation ("Paramount Film"), Twentieth Century-Fox Film Corporation ("Fox"), United Artists Corporation ("United"), Universal Film Exchanges, Inc. ("Universal"), and Warner Bros. Pictures Distributing Corporation ("Warner Bros.").

‡New England Theatres, Inc. ("New England"), which operated the Paramount Theatre in Lynn (PR 1136, 1137), and Massachusetts Amusement Corporation and Stanley Warner Management Corporation, two affiliated companies (collectively hereinafter sometimes referred to as "Stanley Warner"), the first of which operated the Warner Theatre in Lynn, to which the second supplied managerial services (PR 587).

Usually, and during most of the period, each defendant distributor gave its first-run and a twenty-one-day clearance to the downtown Boston theatres (PR 70, 229-230, 348-349, 578-579, 812, 874, 1109). The theatres in Lynn and in a number of other cities close to Boston were thereafter in most cases entitled to the first suburban run (PR 71-73, 235-236, 349-350, 579-580, 836-838, 875-876), followed immediately by the plaintiff (PR 1444-1447). Except for its competitor in Salem—with which plaintiff had made a "private arrangement" to split product (PR 1228-1230) without the consent of any, and over the expressed protests of some, distributors (PR 258, 652-653, 1438)—all theatres in plaintiff's competitive area (except in Lynn and Boston) were for most of the period subject not only to an availability behind the plaintiff, but to a seven-day clearance in plaintiff's favor (PR 324-325, 1426, 1491, 1494), which favored treatment plaintiff actively sought (PR 1426, 1427, 1494).

All of the witnesses questioned on the subject, including the plaintiff's manager (as the Court below concluded on consideration of his own statements—345 F. 2d at 912-913), testified to the existence of substantial competition between the theatres in Lynn and Salem (PR 116, 251-256, 408, 631, 887, 1166, 1415-1434).

The branch manager of each distributor testified without contradiction that it was to the financial advantage of his company not to play its pictures in Lynn and Salem at the same time, because, by having successive runs or "play-offs" in the Lynn-Salem area, the period during which the pictures would be available to the public in the area would be extended and more people would be able to see them, thus resulting in more film rental to the distributor (PR 141-142, 304, 466, 716-717, 849, 860, 887, 1075). Lynn was a much larger city than Salem (PR 254; 1307-1308), and

each branch manager said that, in his opinion, Lynn, as the larger situation, would accordingly produce the most film rental for his company (PR 118, 255, 384, 631, 849, 887). Given these facts, it was the business judgment of each of them to play Lynn, the larger situation ahead of Salem, the smaller, notwithstanding the conceded fact that the Paramount Theatre in Salem was in size and appointments on a par with the defendants' theatres (345 F. 2d at 911). And, as the Court of Appeals found, "it in no way appears how any distributor could have improved its profits simply by putting plaintiff on the same run as defendant theatre" (345 F. 2d at 913).

In 1958 the plaintiff requested "that film be made available for the Paramount Theatre in Salem, 21 days after Boston showing" (footnote 8, 345 F. 2d at 915). In response to this request, the distributors, Paramount Film and Fox permitted the plaintiff to bid against Lynn for product (PR 107, 392), but the plaintiff was generally unsuccessful for the reason, as admitted by its own manager, that "we just didn't . . . stretch for them and bid a substantial amount of money." The plaintiff's manager conceded that it "didn't bid high enough" (PR 1223). As to the defendants M.G.M. and Warner Bros., plaintiff, pursuant to its "private arrangement" (or "split of product") with its Salem competitor, refused to play any M.G.M. or Warner Bros. pictures (PR 1498-1499). Those two distributors, therefore, did not consider the question whether bidding should be instituted between Salem and Lynn (PR 266-267, 650), and each of them refused to change Salem's availability to that of Lynn (V6 31, 69). The distributors United and Universal (who were not important to plaintiff*) did not understand the plaintiff to request bidding,

*Field, the plaintiff's manager, indicated that the plaintiff favored the product of the defendants Fox and Paramount and the non-defendant Columbia (PR 1333).

and also declined to change its availability to that of Lynn (V6 72-73; PR 974).

The important non-defendant distributor Columbia permitted the plaintiff to play on the Lynn availability for most of the period in question (PR 1092), for the reason that its customer in Lynn, the non-defendant Capitol Theatre (PR 1093-1094), was greatly inferior to all the theatres involved in this litigation (PR 1119, 1162, 1171).

The exhibitor defendants, New England and Stanley Warner, were not shown to have taken any action to secure, or to hold onto, the challenged priority of run in their favor. The plaintiff made no protest to either of them (PR 1436-1437); but the evidence showed that Stanley Warner's protest as to its playing position after Boston was denied (PR 156-157, 741, V6 8, 10); and that both Lynn exhibitors protested without avail against the institution late in the period by the distributor Universal of its so-called "new releasing plan" (PR 1051-1056; Ex E). So far as the record shows, the defendant Lynn exhibitors did nothing parallel or otherwise, except to receive without protest that run which the distributors gave them.

Argument.

This petition reiterates for 89 pages* and with numerous lengthy footnotes, the plaintiff's previous attempts, before the Trial Court and the Court of Appeals, to show a non-existent factual basis for the claimed conspiracy, the result of which (if it existed) was to cause plaintiff to show

*Indeed, respondents respectfully suggest that it might well be found that this petition should be denied on the ground of the failure of the petitioner to present its points with accuracy, brevity or clearness within the meaning of paragraph 4 of this Court's Rule 23.

pictures in Salem twenty-eight days after Boston instead of twenty-one days as it wished to do. No actual conflict with the decisions of this Court or of any other Circuit is shown, and no important questions of Federal law not previously adequately dealt with by this Court are raised. Indeed, it affirmatively appears that the Trial Court correctly directed a verdict for the defendants and that the judgment of the Trial Court on that verdict was correctly affirmed.

I. There are no special or important reasons for granting a review on writ of certiorari on this petition.

The Court of Appeals stated in summary of its decision affirming the judgment of the District Court "that placing the plaintiff behind Lynn was plainly commercially justified and that there is nothing else to support an affirmative finding of illegal conspiracy. Consequently plaintiff must be regarded as just another exhibitor commercially disappointed in not receiving better treatment. . . ." (345 F. 2d at 915).

This is just another of the long series of cases in which a subsequent-run exhibitor, disappointed at not receiving the playing position which it desired, seeks damages (on the ground of an alleged conspiracy against the exhibitor in violation of the anti-trust laws) against those distributors of motion pictures with whose distribution practice the exhibitor disagrees.

The principles of law applicable to these cases are well-settled* and have been clearly enunciated by this Court,

*As recently as in the October, 1964, term, this Court reviewed a private motion-picture anti-trust case. *Viking Theatre Corp.* v. *Paramount Film Distributing Corp.*, 378 U.S. 123. But the *Viking* case involved unique issues of law concerning the practice of "splitting product" not involved in this case. See *Viking Theatre Corp.* v. *Paramount Film Distributing Corp.*, 320 F. 2d 285 (3 Cir. 1963).

and this Court has long recognized, and sanctioned, a method of distribution of motion picture films employing runs and clearances.*

United States v. *Paramount Pictures, Inc.*, 334 U.S. 131, 144-145.

Theatre Enterprises, Inc., v. *Paramount Film Distributing Corp.*, 346 U.S. 537.

An examination of the petition reveals that it involves no novel or important questions of law, but merely consists of a voluminous and minutely detailed argument attempting (unsuccessfully, respondents say) to construct a factual basis for its claim of conspiracy and merely reiterating all of its claims, assertions and conclusions which had been rejected by the Courts below.

It has not been the policy of this Court to "grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227. In this connection, in *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, in dismissing a writ as improvidently granted, this Court said, at 509:

> "The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public

*"A clearance is the period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres.

"Runs are successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on. . . ." *United States* v. *Paramount Pictures, supra*, 144-145. In *Paramount* the District Court expressly recognized "the proved utility of clearance practices in the movie industry and also their apparent necessity for a reasonable conduct of the business." *United States* v. *Paramount Pictures, Inc.*, 66 F. Supp. 323, 342.

use—primarily a question of fact. That is not the ground upon which we granted the petition and if sufficiently developed would not have moved us thereto."

And in *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, at p. 178, this Court cited the above cases in saying: "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."

This Court has held that certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of . . . authority between the circuit courts of appeal." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393.

Respondents respectfully submit that there has been no such showing by this petition.

II. THE DECISIONS OF THE COURTS BELOW ARE NOT IN CONFLICT WITH ANY DECISION OF THIS COURT NOR IN CONFLICT WITH ANY DECISION OF ANY OTHER COURT OF APPEALS.

A. The Courts below, notwithstanding plaintiff's unsupported assertions in the petition to the contrary, did consider the evidence as a whole, allowing the plaintiff the benefit of all inferences to which it was entitled under the decisions of this Court, but there was no evidence in the record, direct or circumstantial, from which a jury could find any conspiracy in violation of the anti-trust laws.

The petition makes the assertion *pro forma* (Pet. 3), without any basis therefor, that the Courts below "did not

allow petitioner the benefit of all the evidence, did not allow the petitioner the benefit of all inferences and presumptions to be drawn from the evidence in favor of petitioner in direct conflict with this Court's opinions in *Beacon Theatres Inc.* v. *Westover*, 359 U.S. 500 (1959), *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, and *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473."

But the plaintiff's bare assertion that it was denied permissible inferences from the evidence which would entitle it to go to the jury is not supported by the record. The trial judge granted the defendants' motion for a directed verdict *"on all the evidence"* (emphasis added) because "the plaintiff has failed in this case to prove that the defendants were engaged in any conspiracy . . ." (PR 1571). The Court of Appeals reached its conclusion to affirm the judgment of the Trial Court on the basis (as stated at the outset of its opinion) that "the primary question" was "whether the evidence, including any which we may find the district court wrongfully excluded, entitled, or would have entitled, the plaintiff to go to the jury" (345 F. 2d at 911).

It is uncontested that there was no direct evidence of any conspiracy here (345 F. 2d at 911).

Plaintiff predicates its entire case on the ground that it has established "consciously parallel action" on the part of the defendants plus certain other facts ("plus factors") which plaintiff says entitle it to get to the jury (Pet. 21).

It has been well settled by this Court that " 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." *Theatre Enterprises, Inc.*, v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541.

And the First Circuit (345 F. 2d 910), following its previous decisions in *Brown* v. *Western Massachusetts Thea-*

tres, Inc., 288 F. 2d 302 (1 Cir. 1961), and *Winchester Theatre Co.* v. *Paramount Film Distributing Corp.*, 324 F. 2d 652 (1 Cir. 1963), held that the plaintiff adduced no other meaningful circumstantial evidence.*

Obviously, just any "plus factor" will not enable the plaintiff to go to the jury. The "plus factor" must be probative of a conspiracy. This principle was ably and clearly enunciated by the Third Circuit in *Gold Fuel Service, Inc.*, v. *Esso*, 306 F. 2d 61, 74 (1962), cert. den. 371 U.S. 951 (1963):

> "Recently, in *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 3 Cir. 1961, 297 F. 2d 867, cert. denied, 1962, 369 U.S. 839, 82 S.Ct. 867, 7 L.Ed. 2d 843, we concluded that even consciously parallel action by manufacturers of cigarettes in dealing with a prospective buyer did not supply a sufficient basis for submitting the question of preconcert to the jury, *absent attendant circumstances making it unlikely that these parallel courses of action had resulted from the exercise of independent judgment by each manufacturer.* Here, we think the plaintiff has given no indication that it could show a basis for a logical inference of preconcert predicated on conscious parallelism. This omission is fatal to the plaintiff's case. . . ." (Emphasis added.)

Plaintiff below mainly relied (345 F. 2d at 912) on the unsupported conclusion of its theatre manager, Field, that

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*Whether there was even any meaningful evidence of "conscious parallelism" is open to question here, for the record reveals that the responses of the distributors to plaintiff's self-styled "bid or negotiate letter" varied widely and were inconsistent with any idea that each defendant was acting in reliance on what the others were doing (PR 107, 266-267, 392, 650, 899-901, V6 72).

there was no substantial competition between the theatres in Lynn and the theatres in Salem as constituting a sufficient "plus factor" to entitle it to go to the jury, and, in this petition, still pursues this untenable position (Pet. 23-27). But the record shows, and the Court of Appeals held, that Field "repeatedly testified to specific matters incompatible with" his "conclusory statement" that no substantial competition existed (345 F. 2d at 912). Examples of such inconsistencies noted by the Court of Appeals included Field's admissions that the difference between the twenty-eight days in which his theatre played behind Boston and the twenty-one days of the Lynn theatres was not in itself serious, but drew significance only from the fact that it meant Lynn was playing films a week before Salem (1434-1435; 1535); that Lynn was his "big loss" (PR 1421); that (as summarized by the Court of Appeals—345 F. 2d at 913) "Salem residents, as well as those of Peabody and Marblehead [were] an 'important part' of his patronage" and "'other things being equal' . . . as likely to go to the movies in Lynn as in Salem" (PR 1419, 1432-1433). Field was willing to speculate in his deposition that, if plaintiff played day and date with Lynn, plaintiff's gross "should increase 30 to 50 per cent" which "would probably come out of the Lynn theatre gross. . . ." (PR 1423). Numerous other examples of statements by Field completely contrary to his conclusion as to no substantial competition exist in the record (*e.g.*, PR 1419-1423, 1433; V6 4). On such a record the Court of Appeals felt constrained to state that "we cannot, on the record as a whole, find that Field's favorable testimony made out enough on this issue to warrant a verdict in plaintiff's favor to stand" (345 F. 2d at 913). In the words of the Court of Appeals: "An ultimate conclusion not only unsupported by, but contradictory to the subsidiary facts cannot stand, be it reached by a jury or expressed by a witness. See *Interna-*

tional Paper Co. v. *United States,* 5 Cir. 1955, 227 F. 2d 201, 205, and cases cited therein." Thus it appears, with respect to the "plus factor" principally relied upon by the plaintiff in the Courts below, that no meaningful evidence showing that "factor" exists in the record.

Nor was there any evidence from which it could be inferred that the defendants acted against their best business interests. In this case each defendant distributor's branch manager testified to his belief that his company's economic self-interest required it to play the defendant Lynn theatres ahead of Salem (*supra,* p. 5). None of the witnesses in this case, including Field, even offered to speculate that playing the Salem theatres* day and date with Lynn would result in more film rental for the distributors. Even Field, the plaintiff's manager, recognized that any such increase would be at the expense of Lynn (PR 1423). The plaintiff's theatre was located in the much smaller City of Salem, and, for this reason, its grossing potential was, or so defendants could reasonably believe, much less than that of either of the defendant Lynn theatres. The distributors, believing it to be to their advantage to have two runs in Lynn and Salem, would naturally put the larger situation ahead of the smaller.

The overall gross admission receipts of each of the defendant Lynn theatres greatly exceeded the gross admission receipts of the plaintiff (Pet. 48). The evidence also established, even with respect to almost all of the relatively few pictures as to which plaintiff paid a greater *percentage* of its gross admission receipts as film rental than the defendant Lynn exhibitors (V6 75 ff.), that the Lynn exhibitors paid more *dollars* in film rental than the

*It would have been necessary, as a practical matter, to have moved both Salem theatres up with Lynn together. Moreover, this step would have served as leverage for the theatres behind Salem in seeking an earlier availability.

plaintiff (see *supra*, p. 5; V6 69, 93; Ex 100). Neither (*i*) the evidence of a few isolated pictures (over a more than ten-year period) cited by the plaintiff (*e.g.*, Pet. 29) on which the plaintiff's theatre did pay more film rental nor (*ii*) the plaintiff's evidence of a number of pictures (selected by it) on which the plaintiff, although it paid fewer dollars in film rental, paid a higher percentage of its gross admission receipts in film rental (V6 75 ff.) affects the uncontradicted evidence that, overall, the Lynn theatres were greatly superior in revenue-producing potential (PR 118, 255, 452, 631, 849, 887).* It should be noted that this superiority was greatest in the earlier years of the period, which would have been the years known to the defendants at the time they considered Field's January 31, 1958, request to play on the twenty-one-day availability (Pet. 48).

The evidence on the question of the defendants' best financial interests was correctly summarized by the Court of Appeals when it said:

> "We find plaintiff's contention that placing it behind Lynn was contrary to defendant exhibitors; best

*The difference between the plaintiff's "scale" and the "scales" of the defendant Lynn exhibitors (see Pet. 35) would seem to be irrelevant to the issues in this lawsuit. The "scale," which was first set by the exhibitors in negotiations with each distributor (PR 5 32), and which was described by an officer of the plaintiff in correspondence as "our policy" (V6 42), is not evidence of any discrimination against the plaintiff. The theory of the "scale" was to cause the percentage film rental to be paid in contracts to bear some relationship to the overhead of the theatre (PR 532). Plaintiff made no effort to prove that its "scale" was not fairly fixed in this context or that the "scales" of the Lynn theatres were discriminatorily favorable to them. There was no requirement for the plaintiff to bid in terms of its "scale" with Fox or Paramount Film, and the "scale" was irrelevant for that reason as to the conduct of bidding by those two distributors.

financial interests, independently considered, totally unsubstantiated. That is, it in no way appears how any distributor could have improved its profits simply by putting plaintiff on the same run as the defendant theatres. Nor can plaintiff make anything of the fact that defendants never did any 'experimenting,' in the absence of any showing that defendants had reason to suppose that a change would be financially profitable. It is true defendants never made any surveys of the patterns of patronage in the Lynn-Salem area. Neither did plaintiff. If the status quo was reasonable it did not become unreasonable because defendants failed to experiment to see if something else might also work, or conceivably, might work better."

So it is with all the other "plus factors" mentioned by the plaintiff, all of which were raised below and as to all of which, first the Trial Court, then the Court of Appeals could find nothing probative of any conspiracy on the part of the defendants against the plaintiff in violation of the anti-trust laws.

To the extent that the petition is based on the plaintiff's claim of vertical conspiracies (Pet. 44), it need merely be noted that the plaintiff is required to prove the existence of each separate conspiracy, and, as to each, the fact of damage. Plaintiff did not produce any evidence that any such "vertical" conspiracies existed, and failed even to attempt to adduce any evidence of damage to it resulting from any claimed vertical conspiracy. The failure to show the fact of damage alone would justify a directed verdict for defendants. See *Momand* v. *Universal Film Exchanges, Inc.*, 172 F. 2d 37 (1 Cir. 1948), cert. den. 336 U.S. 967. *Malta Manufacturing Co.* v. *Osten*, 215 F. Supp. 114, and cases cited at page 121 (D. Mich. 1963); see also *Story*

Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562.

Accordingly, it can be seen that this is not a case where the lower Courts departed from the principles enunciated by this Court in the *Beacon, Continental Ore* and *Poller* cases as to inferences to be drawn from the record. For the record, viewed as a whole, does not admit of any inferences which could reasonably be so drawn of conspiratorial action by the defendants. On the contrary, the actions of the defendants were shown to be "plainly *commercially* justified," and not the result of any illegal conspiracy (345 F. 2d at 915—emphasis added).

B. There is no conflict between Circuits.

J.J. Theatres, Inc., v. *Twentieth Century-Fox Film Corp.*, 212 F. 2d 840 (2 Cir. 1954), relied upon by the petitioner to show a conflict between Circuits, is not inconsistent with the decision of the First Circuit in this case.

The *J.J. Theatres* case arose on an instruction by the Trial Court (that case having been submitted to the jury) which in effect told the jury that it could only find for the plaintiff if it found that no substantial competition existed between the theatres involved (both of which were located in the Bronx within about a mile or mile and a half of each other). The challenged instruction had the effect of removing from consideration by the jury the question whether it could find a conspiracy against the plaintiff based on a refusal by the defendants to negotiate with the plaintiff on any terms for the exhibition of pictures on a first neighborhood run.

The facts here are quite different.* Substantial compe-

*Among the other distinctions which can be made between that case and this, it should be noted that the plaintiff in *J.J. Theatres* was subjected to "clearances" in favor of the defendant exhibitors

tition between theatres in Lynn and Salem was established in this case; but the decision to hold Salem in back of Lynn was "commercially justified" based on uncontroverted evidence in favor of Lynn as to the relative revenue producing potential of the two cities.

Nor was there any evidence of any refusal to deal by the defendants as might have been found in the *J.J. Theatres* case. On the contrary, in the instant case it was the plaintiff who (because of its "private arangement") refused to deal with the defendants M.G.M. and Warner Bros.

Moreover, the defendants Paramount Film and Fox offered the plaintiff the right to play on the Lynn availability by bidding for their product, but the plaintiff by its own admission declined seriously to try to obtain product by this method (PR 1223). Since Paramount Film and Fox, along with Columbia (which supplied plaintiff with product on the Lynn availability), were the plaintiff's most important sources of product (PR 1333), it is difficult to see how it could be inferred from the evidence, reasonably or otherwise, that the plaintiff was the victim of a conspiracy to deprive it of the run it desired, even apart from the plain fact that all the evidence was to the effect that it was to the defendants' best business interest to play Lynn first.

C. The evidentiary rulings of the trial judge were clearly correct and should not be reviewed by this Court.

The petition is also predicated in part upon certain evidentiary rulings made by the Trial Court, the bases of

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which could have been found to be unreasonable. In this case there was no "clearance" (or period of time between runs) in favor of Lynn, but merely a "priority of run" which permitted the plaintiff to play immediately after the close of the Lynn run (PR 415-416). (See footnote 3 in the opinion below, 345 F. 2d at 912).

which are summarized in respondents' statement of "Questions Presented" (*supra*, pp. 1-2). These rulings dealt with matters of competency and relevance peculiarly within the province of the trial judge, such as the competency of so-called "experts" and the admissibility of testimony offered through them, and their qualifications, the remoteness (in time) and repetitiousness of certain letters, and other evidence of a speculative nature relating to the subject of damages. In the petition (p. 50) the plaintiff complains that the Court of Appeals "did not discuss" the exclusion of this evidence. In its opinion, however, the Court of Appeals stated: "We have considered all of plaintiff's evidentiary points. No error appears that can affect the basis of this decision" (345 F. 2d 910 at 915). Petitioner seeks by its claims on the evidentiary points to persuade this Court (having failed so to persuade the Court of Appeals) to pass on questions of admissibility of evidence which have been traditionally, and ought in the interests of justice to remain, in the area of the trial judge's discretion.

See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 230-231.

Chateaugay Ore & Iron Co. v. *Blake*, 144 U.S. 476.

United States v. *Johnson*, 285 F. 2d 35 (9 Cir. 1960).

Winthrop Products Corp. v. *Elroth Co., Inc.*, 331 Mass. 83 (1954).

And in any event it is clear that no issue of consequence for this Court is shown with relation to such a subject matter so that the granting of certiorari would be warranted.

Conclusion.

Because the petition discloses no special or important reasons for review by this Court, but involves only questions of law on which this Court has already definitively passed, and because no conflict with any decision of this Court or any Court of Appeals appears in the record, it is respectfully submitted that the petition should be denied.

Respectfully submitted,

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